No. 83-600

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1983

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GARY D. APKER,
CALVIN DAVENPORT,
RAYMOND GEARHART,
a/k/a "Buzzard",

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

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On Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Eighth Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Are search warrants purporting to allow seizure of "indicia" of memberships in associations not per se illegal ever consistent with First Amendment rights of assembly? Can the judicially created "inevitable discovery" exception to the exlusionary rule, about which the circuits are in conflict, be used to prevent suppression of items seized under the purported authority of an "indicia" warrant found to be unacceptable according to Fourth Amendment principles?

In this case the appellate court, paying but slight attention to First Amendment considerations, generally approved, in a case of first impression, "indicia" warrants but found the particular warrants to be insufficient to meet Fourth Amendment criteria. The court refused to order suppression of the illegal seized items, holding that their

discovery was inevitable during the course of a second state warranted search. The court found no significance in the fact that the state warrants could have been based upon the fruits of the first search, which was conducted pursuant to the purported authority of the prior invalid federal warrant.

Neither the validity of "indicia" warrants nor the rule of "inevitable discovery" have been examined by this Court. The former is an issue but recently presented to two federal appellate courts whose reasoning appears to conflict. The later issue has been resolved in opposite ways by the several federal appellate courts.

## REPORTS OF OPINIONS BELOW

The opinion below appears at 705 F.2d 293 (8th Cir. 1983).

## JURISDICTION

Date of Judgment Sought to be Reviewed: April 24, 1983.

Date of Order Denying Rehearing: August 8, 1983.

Statutory Provision Believed to Confer Jurisdiction: 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS

### Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### Amendment IV

The right of the people to be secure in their persons, houses, papers, and

effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented . . . . . | i |
| Reports of Opinions Below . . . . . | iii |
| Jurisdiction . . . . . | iii |
| Constitutional Provisions . . . . . | iii |
| Table of Authorities . . . . . | v |
| Statement of the Case . . . . . | 1 |
| Argument . . . . . | 11 |
| Conclusion . . . . . | 21 |


APPENDIX INDEX


Opinion of the United States Court of Appeals for the Eighth Circuit . . A-1

Order Denying Rehearing . . . . . A-72


TABLE OF AUTHORITIES

Court Decisions:


Gibson v. Florida Legislative Investigation Committee, 372 U.S. 534 (1963) . . . . . 11

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) . . . . . 11

United States v. Griffin, 502 F.2d 959 (6th Cir. 1974). . . . . 15

United States v. Rubio, 703 F.2d 1124 (9th Cir. 1983). . . . . 12

Warden v. Hayden, 387 U.S. 294 (1967) . . . . . 12

Zurcher v. Stanford Daily, 436 U.S. 547

Page

(1978) . . . . . 15

U.S. Constitutional Provisions:

Amendment I . . . . . 12, 13, 14, 19, 21
Amendment IV . . . . 13, 14, 16, 19, 21

Rules and Statutes:

28 U.S.C. Section 1254 . . . . . iii

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## STATEMENT OF THE CASE

The facts relative to the resolutions of the issues raised by this petition are succinctly presented by the appellate

court in its opinion.[1] In the interest of brevity they will not be completly recited except as necessary to emphasize the importance of this case.

Petitioners and seven others[2] were charged in a three count indictment by a grand jury in the District of Nebraska on February 27, 1981. Count I charged all with conspiring to distribute methamphetamine. Counts II and III charged petitioner Apker and four others with possession of the same drug with intent to distribute in 1978 and 1976 respectively. Count I alleged that the conspiracy, nine years in duration, was conducted through the Hells Angels Motorcycle Club. All

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[1] Infra pp. A-1 through A-71.

[2] Of those ten, six, including Petitioners were jointly tried. Judgments of Acquittal discharged one, a second did not appeal, and a petition for rehearing is currently pending with respect to the third.

defendants were past or present members of the club with one exception, and she was the widow of a member.[3/]

After the indictment was returned, arrest warrants were obtained for each of the defendants named therein, and search warrants for the purported residence of the defendants authorizing a search for "indicia" of membership in, and/or association with, the Hells Angels Motorcycle Club. Bail was set on the warrants in the amount of $200,000 cash for each defendant.

At approximately 4:00 a.m. on February 28, teams of law enforcement officers from the United States Attorneys Office, U.S. Bureau of Alcohol, Tobacco, and Firearms (AFT), U.S. Drug Enforcement Agency (DEA), Nebraska State Patrol (NSP),

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[3/] This is the defendant whose petition for rehearing is still pending.

Douglas County Sheriff's Office (DCSO), and Omaha Police Division (OPD) met at OPD headquarters. There they were addressed by various Federal and local officers with respect to plans and procedures for executing the arrest and indicia search warrants, including Acting United States Attorney Thomas Thalken and the head of the OPD Special Intelligence Unit, Lt. Michael Fleharty.

At the briefing those present were told that in executing the indicia search warrant they should be looking for property that would document affiliation with the Hells Angels. They were given to understand that they could open every drawer in any residence, and that even a sealed envelope could be opened to determine whether or not there might be something inside that would relate to membership in or association with the Hells Angels Motorcycle Club.

They were told that each officer involved in the execution of the indicia search warrant should individually decide whether or not a particular item should be seized. They were further given to understand that their discretion in this regard was unlimited.

Despite the fact that the indicia search warrant did not mention firearms or controlled substances, those present at the briefing were told to be on the lookout for guns and drugs. They were also told that, in the event that suspected controlled substances were observed during the execution of the federal indicia search warrant, machinery had been establised to obtain a State of Nebraska search warrant quickly. A judge or magistrate was standing by, and typists and other state and federal law enforcement leadership personnel, including Lt. Fleharty and acting U.S. Attorney Thalken, were available to assist in this

process.

During the execution of the two federal warrants drugs and guns were discovered at the various residence where petitioners were arrested. These items were seized. State search warrants for the seizure of drugs were issued by the personnel who were standing by and subsequently executed. A superceding indictment containing fifteen Counts was returned on April 23. This indictment added counts of possession of controlled substances (seized on February 28) with intent to distribute as well as unlawful possession of firearms by felons.

"otions for Judgment of Acquittal at the close of the government's case on the conspiracy counts were granted in favor of all defendants. The jury returned guilty verdicts of the lesser offense of possession of controlled substances on those counts which charged possession with intent

to distribute, and convicted petitioners of unlawful possession of firearms. It is these convictions which were appealed.

The "indicia" warrants purported to authorize the seizure of specific articles of clothing distinctive to the club, plaques and mirrors inscribed with the club name, "other items which give the names of members of the Hells Angels," photographs of club members, lists of members locally and nationally, and club records and papers to determine membership. The affidavits recited that these articles were necessary to establish association with the club to prove involvement in the alleged conspiratorial activities.

Before the appellate court petitioners contended that the federal "indicia" warrants were invalid as an infringement upon First Amendment rights to Freedom of Association. The appellate court was faced with a case of first impression.

Indeed, the issue has been presented to only one other federal appellant court, the Court of Appeals for the Ninth Circuit, in a case which was being considered simultaneously. These courts did not agree on the appropriate disposition of the issue, positions which will be considered in more detail in the Argument. The Eighth Circuit rejected petitioners' First Amendment claims, and decided the case almost exclusively on a Fourth Amendment analysis. The court found that there was a sufficient nexus between the items sought in the "indicia" warrants and the alleged criminal behavior to support their issuance. The court did, nevertheless, hold the warrants to be invalid by applying the doctrine of "scrupulous exactitude" to the particularity requirement of the Fourth Amendment because of the First Amendment protection applicable to membership in the Hells Angels Motorcycle Club.

Although the court was satisfied that the items of clothing were described with sufficient particularity the "other items" authorized to be seized to determine club membership were not.

Petitioners also argued that the warrants violated the Fourth Amendment in that they were but a pretext for gaining entry to the residences to conduct general searches for guns and drugs, and that they were overly broad and not issued upon probable cause. The appellate court observed that the pretextual argument was not frivolous but did not vitiate the warrant on those grounds as applying a "clearly erroneous" standard.

Despite holding the "indicia" warrants invalid, however, the appellate court concluded that suppression was not required by applying, for the first time in the Eighth Circuit, an "inevitable discovery" exception to the exclusionary rule.

The court concluded that some police activity could surround the execution of the valid federal arrest warrants and that the later state search warrants issued for the seizure of drugs would have resulted in the inevitable discovery, not only of drugs but the firearms.

The Judgment of appellate court was entered on April 19, 1983, and a petition for rehearing was denied on August 8, 1983.[4/]

[4/] Infra, pp. A-72.

## ARGUMENT

### THIS CASE PRESENTS SPECIAL AND IMPORTANT REASONS WHY THIS COURT SHOULD REVIEW THE OPINION OF THE COURT BELOW: THE CONSTITUTIONAL IMPLICATIONS OF INDICIA SEARCH WARRANTS, AN ISSUE WHICH HAS BEEN PRESENTED TO BUT ONE OTHER FEDERAL COURT OF APPEALS AND HAS NOT BEEN RULED UPON BY THIS COURT; AND THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE CONCERNING WHICH THERE IS A CONFLICT AMONG FEDERAL COURTS OF APPEAL.

The Eighth Circuit did not reach the First Amendment claims of petitioners justifying invalidation of the "indicia" warrants, deciding that its "sufficient nexus" conclusion was dispositive. The Court did, however, recognize the possible First Amendment implications of the "indicia" warrants, citing Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) and NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). The court concluded, nevertheless, that proof

of membership in the club would "help show appellants' associations with each other and their opportunity to use the Hells Angels organization for illegal activities.[5/]

The Ninth Circuit was presented with an identical issue in United States v. Rubio, 703 F.2d 1124 (9th Cir. 1983). The Rubio court placed greater First Amendment significance on membership in a group or association not per se illegal, even faced with a allegation of illegal activity by some individual members of the association. Establishing an association does not establish support for a warrant for the seizure of indicia of that association. Nor would the "mere evidence" rule of Warden v. Hayden[6/] support the warrant

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[5/] 705 F.2d 293, 298 (8th Cir. 1983) (emphasis supplied).

[6/] 387 U.S. 294 (1967).

according to Rubio court. [W]here there is no allegation that the enterprise is wholly illegitimate . . . evidence of mere association would not necessarily aid in obtaining a conviction."[7/]

This court must mandate a more scrupulous adherence to the right of freedom of association. To justify a First Amendment infringement by reliance upon the word "particularly" in the Fourth Amendment is far too tenuous a "safeguard" of the people to peacefully assemble. Why is the seizure of a particular article of clothing approved when the seizure of other items protected by the First Amendment is decried? Is it permissible to seize a membership roster merely because a police officer can generally describe its container?

There has never been a suggestion in this case that the warrants were issued

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7/ Id. at p. 1129.

for any purpose other than to seize evidence of petitioners' membership in the Hells Angels Motorcycle Club (unless it is the pretextual possibilities of the search spoken of by the appellate court), and here lies the rub of any "indicia" search warrants. The government can allege that any organization is engaged in criminal activity, preferably conspiratorial in nature, and launch an exploratory search for particularly described evidence of association, as opposed to particularly described evidence of wrongdoing, which may yield evidence of possible criminal activity.

The analysis by the Eighth Circuit is simply not satisfactory. The Fourth Amendment intrusion into areas protected by the First Amendment deserves at least as careful an exposition as that provided by the Ninth Circuit and more. To repeat, protection is not provided by requiring

merely a particularized description of the indicia of association, rather it is the particularized description of a subject's criminal activity which must be required. The principle of Zurcher v. Stanford Daily[8/] should apply at the threshold of the residence and not merely after entry has been attained.

After holding the "indicia" warrant invalid, the appellate court adopted an "inevitable discovery" rule and applied it to avoid suppression of the guns which are predicate for the instant convictions.

The Sixth Circuit has rejected this rule in United States v. Griffin, 502 F.2d 959, 961 (6th Cir.), cert. denied, 419 U.S. 1050 (1974). That court held that such speculation is beyond judicial review and would "tend in actual practice to emasculate the search warrant requirement of

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[8/] 436 U.S. 547 (1978).

the Fourth Amendment."[9/] Although, as the Eighth Circuit Court of Appeals pointed out, the majority of federal appellate courts have embraced this "exception" to the exclusionary rule, it is submitted that this Court should take this opportunity to prune such a speculative concept from the Fourth Amendment. In any event, the circumstances of this case do not admit of any such doctrine, and the appellate court was incorrect in applying it here.

The appellate court held that although the warrants and seizures of the firearms were invalid, the firearms would have been discovered under the later state warrants for drugs, based on so-called "plain view" observations. The appellate court accepted the government's position that even if the guns were seized under the invalid federal warrants before the state warrants were obtained the "inevitable discovery" rule operates to frustrate suppression. This

reasoning overlooks several important facts.

In the first place, the "indicia" searches were unlawful ab initio, and even if the entries were lawful they would only have justified arrests and not searches; the contraband was discovered during the "indicia search," beyond the scope of apprehending the suspects and securing the premises.

Secondly, the officers had been specifically briefed and instructed to look for firearms and drugs, thus, the finding of these items could not possibly be "inadvertent" or justified under any plain view doctrine.

Thirdly, no warrants were ever obtained for seizure of the firearms; the later state-issued warrants were only for drugs, and no logical or Constitutional distinction can justify seizure of the firearms without benefit of warrants.

The appellate court, incongruously, despite its application of the "inevitable discovery" rule, rejected the government's proferred "plain view-severance" rationale (adopted by Judge Bright, dissenting (in part) holding that "indicia warrants by their very nature are potentially subject to abuse." Yet it was only by an even more dangerous and attenuated application of a "plain view" species of rationale-the "inevitable discovery" theory-that the court affirmed these convictions.

It is, therefore, contended that the reasoning of the Sixth Circuit in Griffin is correct, and that any concept of inevitable discovery can involve merely judicial speculation beyond the realm of valid appellate activity. Such a rule should be rejected by this Court, and this case provides an excellent opportunity for doing so. The existence of the state warrants should not undermine this position as the

appellate court indicated that its application of the inevitable discovery rule is operative regardless of the timing of the discovery of the firearms.

As a concluding thrust petitioners urge this court to consider the pretextual ramifications of the warrants in this case, a point not lost upon the appellate court, to exercise its jurisdiction to vitiate at least this indicia warrant and the application of the inevitable discovery rule at least in this case. The highly sensitive First and Fourth Amendment aspects of the "indicia" warrants themselves, distinguish this case from the "inevitable discovery" cases relied upon by the appellate court. The appellate court did observe that pretexts can at time go unnoticed by a magistrate and the possibility of an almost unlimited search may prove very tempting for law enforcement officials.

After first recognizing that the claims of pretext by petitioners were "not frivolous" the appellate court, nevertheless, refused to invalidate the search on those grounds, overlooking several facts: (1) the officers conducting these highly organized simultaneous searches (based only on the conspiracy charges and "indicia" warrants) were told to expect to find firearms and drugs; (2) machinery was in place to obtain drug warrants, but no effort or plans were even made to obtain firearm warrants; (3) the federal magistrate who issued the indicia warrants was not informed of these expectations and intentions; (4) the officers were given and in fact exercised unlimited discretion in their broad and probing searches under the pretext of the "indicia" warrant; (5) certain items were seized which were utterly beyond <u>any</u> of the warrants or even the "inevitable discovery" rationale. Nothing

supports a finding that the searches and seizures were anything but pretextual; on the contrary all of the facts confirm it. The grave threat to individual liberties guaranteed by the First and Fourth Amendments which are posed by such clearly non-frivolous and factually supported claims that the searches were pretextual in nature is another factor clearly deserving of this Court's consideration.

## CONCLUSION

This case is a uniquely appropriate one to bring before this Court at this early opportunity the question of the validity and/or permissible scope for "indicia" search warrants as well as standards, if any, for this issuance and use. This is one of but two cases which have been decided by federal appellate courts involving this issue and neither court, while somewhat in conflict, fully address the significant problems which are presented.

Further, this case gives this Court an appropriate forum from which to address the concept of an "inevitable discovery" exception to the exclusionary rule, concerning which there is a conflict among the circuits. This is a singular case for this issue either in general or under the specific facts herein.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 82-1168

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United States of America, *
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Appellee, *
*
v. *
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Gary D. Apker, *
*
Appellant. *

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No. 82-1169

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United States of America, *
*
Appellee, *
*
v. *
*
Calvin Davenport, *
*
Appellant. *

No. 82-1201

United States of America, *
*
Appellee, *
*
v. *
*
Raymond Gearhart *
a/k/a "Buzzard," *
*
Appellant. *

No. 82-1242

United States of America, *
*
Appellee, *
*
v. *
*
Janice Fitzgerald, *
*
Appellant. *

Submitted: December 15, 1982

Filed: April 19, 1983

Before BRIGHT, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

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FLOYD R. GIBSON, Senior Circuit Judge.

Gary Apker, Calvin Davenport, Raymond Gearhart, and Janice Fitzgerald each appeals a conviction under 18 U.S.C. app. § 1202(a)(1) (1976) for being a felon in possession of a firearm. They make two major arguments: (1) the searches which produced the firearms admitted against them were executed pursuant to warrants which were invalid under both the Fourth and First Amendments, and (2) they were prejudiced by the joinder of a conspiracy count with the counts from which they appeal.

We find that the warrants violated the Fourth Amendment particularity requirement, but that the joinder was not prejudicial. We also find that the firearms admitted against Apker, Davenport, and Gearhart were nevertheless properly admitted under an exception to the exclu-

sionary rule and therefore their convictions are affirmed. The firearms admitted against Fitzgerald should have been excluded and therefore her conviction is reversed.

## I. Facts

Apker, Davenport, and Gearhart are members of the Hells Angels of Omaha and Fitzgerald is the widow of a Hells Angels member. On February 18, 1981 a grand jury in the District of Nebraska returned a three-count indictment against the four appellants and six other persons. The indictment alleged that the indictees were members of the Hells Angels (or in Fitzgerald's case, an associate), and that as members they were involved in a conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846 (1976). The indictment charged that as part of the conspiracy the Hells Angels attempted to gain a monopoly on

the methamphetamine traffic in Omaha and used threats, beatings, torture, and murder against persons who distributed methamphetamines not acquired from the Hells Angels. Pursuant to the indictment, arrest warrants were obtained.

On February 27, 1982, "indicia search warrants" also were obtained for premises alleged to be the residences of some of the indictees, including all four appellants. The indicia warrants did not authorize the seizure of contraband or fruits or instrumentalities of crime. Rather, they authorized the seizure of indicia of membership in the Hells Angels. All the indicia warrants were identical in their description of the things to be seized. The entire description is as follows:

> A. Sleeveless leather and jean jackets with a Death's Head insignia with wings on the back with the notation "Hell's Angels" written

above the Death's Head and the state that the party is a member of, in this case Nebraska, is written beneath the Death's Head symbol (commonly and hereafter referred to as "Hells Angels's Colors").

B. A metal belt buckle which states "Hell's Angels" on it.

C. Certain plaques, mirrors and other items which give the names of members of the Hell's Angels.

D. Photographs which depict the association of members of the Hell's Angels.

E. Telephone books with telephone numbers listed therein of members of the Hell's Angels, which includes local and national members.

F. Certain papers relating to Club activities, expenditures, financial records, Club rules and regulations.

G. Red T-shirts with "Hell's Angels" printed on them.

The affidavit supporting the search warrants said the indicia were necessary

because proving the indictees' associations with the Hells Angels was necessary to prove their involvement in the alleged Hells Angels drug conspiracy.

The arrest and search warrants were executed at approximately 7:00 a.m. on February 28, 1981, by teams of federal and state law enforcement officers. Before the warrants were served the officers met at the Omaha police headquarters and were briefed as to the execution of the warrants. They were told that appellants had felony convictions and therefore could not lawfully possess firearms. They were told to be on the lookout for guns and drugs. They were also told that a judge would be standing by to execute state search warrants if drugs were found.

Apker, Davenport, and Gearhart were served at residences they were apparently

sharing with a woman.[1] Guns and drugs were found at each residence. Fitzgerald was served at a residence where another woman was present. Guns, but not drugs, were found at her residence. The discovery of the drugs lead to state search warrants which were executed the same morning. On April 23, 1981, the superseding indictment, under which appellants were tried, charged all four appellants with being felons in possession of firearms and charged Apker, Davenport and Gearhart with possession of a controlled substance with intent to distribute.

Jury selection for the trial of appellants and two others[2] began on Sep-

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[1]The residence at which Davenport was found was apparently the woman's. There was some dispute as to whether the other residences were those of appellants or not. The evidence on this point is discussed at pages 19, 28-30, infra.

[2]Of the ten persons indicted, only six were tried because the other four remained at large.

tember 2, 1981, and the government's opening statement came one month later. On November 3, 1981, the district court[3] dismissed the conspiracy counts. The remaining counts were submitted to the jury on November 12, 1981, and the verdicts were returned on November 25, 1981. Apker, Davenport, and Gearhart were found guilty of simple possession of a controlled substance, rather than possession with intent to distribute. Each received a sentence of one year for these counts and they do not appeal the drug convictions. All four appellants were found guilty of being a felon in possession of a firearm and received two-year sentences. It is the firearm

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[3]The Honorable Albert G. Schatz, United States District Judge, District of Nebraska.

convictions that are being appealed.[4]

II. Validity of the Indica Warrants

Appellants argue that the indicia warrants are invalid because they violate both the Fourth Amendment and the First Amendment. In evaluating these claims we are largely writing on a clean slate. Counsel have informed us that to the best of their knowledge indicia warrants have been used only once before their use in the instant case. These were obtained in June 1979 in connection with the prosecution of California Hells Angels members under the Racketeer Influenced and Corrupt Organizations Act (RICO).

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[4]Of the other two defendants tried with appellants, one was charged only on one conspiracy count and the court dismissed that count. The other defendant was convicted only on a charge of simple possession of a controlled substance, was sentenced to one year, and apparently has not appealed. All defendants were given credit for the nine months they spent in jail pending rial. Appellants' sentences were stayed pending appeal.

18 U.S.C. § 1962(c) (1976). One appellate court decision discusses the indicia warrants, United States v. Chesher, 678 F.2d 1353 (9th Cir. 1982), but it was decided on an issue not raised in the instant case. The Chesher court ruled that the defendant was entitled to a hearing on the issue of whether probable cause was based on a recklessly false statement, and that the indicia warrant issued was not justified without finding proof of his current associations with the Hells Angels. Id. at 1362-64. Another case dealing with the same set of indicia warrants involved in Chesher is now pending before the Ninth Circuit. United States v. Rubio, No. 80-1577 (9th Cir.).

A. Fourth Amendment

Appellants' Fourth Amendment arguments can be put into four groups: (1) indicia of membership in a legal organization, i.e., the Hells Angels, cannot be

the proper subject of a search because there is not a sufficient nexus between the evidence sought and the crime being investigated, (2) the warrants had the effect of being general warrants because they failed to describe the things to be seized with sufficient particularity, (3) the affidavit supporting the application for the search warrants did not establish probable cause to believe that there would be indicia of membership in the Hells Angels at the searched premises, and (4) the indicia warrants were obtained as a pretext to search for guns and drugs.[5] We find that there was a sufficient nexus between the indicia of membership in the Hells Angels Motorcycle Club of Nebraska (Hells Angels) and the

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[5]Appellants have not framed their issues precisely as we have, but we feel our statement of the issues makes for better understanding and analysis of appellants' arguements.

crime charged, there was probable cause for the warrants, and the warrants were not pretextual. However, we find that in light of the heightened scrutiny required by the First Amendment interests involved, the warrants failed to describe the items to be seized with sufficient particularity, and therefore the warrants were invalid under the Fourth Amendment.

1. Indicia as the Valid Subject of a Search: The Nexus Requirement.

Appellants' first Fourth Amendment issue is whether there is a sufficient nexus between membership in a legal organization (the Hells Angels) and criminal activity so as to justify a search for indicia of membership. Appellants argue there was no nexus between membership and illegal activity. The government argues that the indictment's allegation that one of the purposes of the Hells Angels was a criminal conspiracy establishes a nexus

between membership and criminal activity.

The rule is well settled that police searches are not limited to instrumentalities or fruits of crime or contraband. Police can search for "mere evidence" of crime if there is a nexus between the item to be seized and criminal behavior. Warden v. Hayden, 387 U.S. 294, 307 (1967). A magistrate must determine whether there is probable cause to believe that the evidence sought will "aid in a particular apprehension or conviction." Id. When dealing with fruits, instrumentalities, or contraband, the nexus between the item to be seized and criminal behavior is automatically provided. But in the case of "mere evidence," such as the indicia of membership in the Hells Angels, finding the nexus can be more difficult.

The government puts forth two justifications for a search for indicia of membership in the Hells Angels. The first

is that appellants' membership in the Hells Angels would tend to show their association with each other in support of the conspiracy charge. The second is that proof of membership would help establish the charge in the indictment that appellants and others used the Hells Angels organization for criminal activity, i.e., controlling the methamphetamine traffic in Omaha. There can be no doubt that establishing appellants' membership in the Hells Angels would not establish that they were engaged in an illegal conspiracy; however, we believe that proof of membership in the Hells Angels would "aid in a particular . . . conviction" because such proof would be probative on the issue. Proof of membership would help show appellants' associations with each other and their opportunity to use the Hells Angels organization for illegal activities.

A wide variety of items might be admitted into evidence in a conspiracy trial; the district court has particularly broad discretion in a conspiracy trial in determining which items will be admitted into evidence. United States v. Skillman, 442 F.2d 542, 551-52 (8th Cir.), cert. denied, 404 U.S. 833 (1971). We have held that proof of association with a political organization is admissible in a conspiracy trial to show the association of defendants with each other. United States v. Baumgarten, 517 F.2d 1020, 1029 (8th Cir.), cert. denied, 423 U.S. 878 (1975)(evidence concerning the history of Students for a Democratic Society relevant and admissible to show the association of defendants with one another). While proof of association or acquaintance alone is not enough to establish the conspiracy, it has sufficient bearing on the issue to make it admissible. United States v. Giese, 597

F.2d 1170, 1187 (9th Cir.), cert. denied, 444 U.S. 979 (1979). Furthermore, evidence of appellants' association with the Hells Angels would help to prove their opportunity to use the Hells Angels organization for criminal activities.

Appellants suggest that their First Amendment right of association is involved in this case and we should examine the nexus requirement with more scrutiny when the First Amendment is involved. While the Supreme Court has indicated that a higher standard of scrutiny is necessary in Fourth Amendment cases with First Amendment implications, it has done so in the context of applying the Fourth Amendment particularity requirement. Stanford v. Texas, 379 U.S. 476, 485 (1965); Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978). We discuss this heightened scrutiny as it relates to the particularity requirement at pages 12-14, infra.

Appellants also argue the indicia had no relevance because they had freely proclaimed their association with the Hells Angels. However, the police cannot be expected to know what elements of proof suspects will concede. Indeed, perhaps it is only because of the evidence seized that appellants have been willing to concede membership in the Hells Angels. It is entirely possible that in some cases the indicia of membership would provide crucial evidence in a case, either to show the association of the alleged co-conspirators with each other or to show that the mode of operation of the conspirators was to use the Hells Angels organization. Therefore, we find that there is a sufficiently close nexus between the items seized and alleged criminal behavior.

2. Particularity in the Description of the Items to be Seized.

The second major Fourth Amendment

issue is whether the indicia warrants satisfied the Fourth Amendment requirement that warrants "particularly describ[e] the . . . things to be seized." Some items were described with specificity, such as Hells Angels leather and jean jackets, red Hells Angels T-shirts, a Hells Angels belt buckle, and photographs depicting the association of members of the Hells Angels. Other items were less specific, such as telephone books with the number of Hells Angels members (local and national) and papers relating to Hells Angels activities, expenditures, rules and regulations. The broadest description was for "items which give the names of

members of the Hells Angels."[6]

a. General Principles.

The Supreme Court has repeatedly stated the underlying considerations behind the particularity requirement. The requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Andresen v. Maryland, 427 U.S. 463, 480 (1976), quoting Stanford v. Texas, 379 U.S. at 485.

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[6]The warrants authorized searches for "certain plaques, mirrors and other items which give the names of members of the Hells Angels." We do not see the words "plaques and mirrors" as significantly limiting the scope of the phrase "other items." No class of objects is readily apparent to us that would be defined by "plaques and mirrors," so as to limit the scope of the phrase "other items." Compare Andresen v. Md., 427 U.S. 463, 480-81 (1976) (phrase "evidence of crime" refers only to evidence of the crime described in the warrant).

See also United States v. Clark, 531 F.2d 928, 931 (8th Cir. 1976). The problem posed by a general warrant " is not of intrusion per se, but of a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). In applying the particularity requirement, we recognize that "the degree of specificity required is flexible and may vary depending on the circumstances and the type of items involved." United States v. Muckenthaler, 584 F.2d 240, 245 (8th Cir. 1978). The Supreme Court has said: "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." Roaden v. Kentucky, 413 U.S. 496, 501 (1973).

The district court, in finding that the indicia warrants met the particularity requirement, relied on United States v. Dennis, 625 F.2d 782 (8th Cir. 1980) and

Andresen, 427 U.S. 463. Dennis dealt with a defendant charged with loansharking. Federal authorities obtained a search warrant for "certain books and records (or items of evidence) relating to the extortionate credit transaction business." We held that the warrant in Dennis was valid because "[w]here the precise identity of goods cannot be ascertained at the time the warrant is issued, naming only the generic class of items will suffice because less particularity can be reasonably expected than for goods (such as those stolen) whose exact identity is already known at the time of issuance." 625 U.S. at 792, quoting United States v. Johnson, 541 F.2d 1311,
1314 (8th Cir. 1976); see also United States v. Coppage, 635 F.2d 683, 687 (8th Cir. 1980) (warrant found valid which authorized search for "books, records, chemical equipment, and personal papers

relating to the manufacture and distribution of methamphetamine"). The language of the warrant in Dennis was very similar to that of the indicia warrants issued here. However, we must follow the principles of Roaden and Muckenthaler and examine the totality of the circumstances--including the First Amendment interests involved, the nature of the items to be seized, and the nature of an indicia warrant.

b. Level of Scrutiny: "Scrupulous Exactitude."

Appellants argue that we should examine the warrants with more scrutiny because First Amendment associational rights are involved. The Supreme Court has stated: "Where the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'" Zurcher, 436 U.S. at 564, quoting Stanford v. Texas, 379 U.S. at 485. In

Stanford v. Texas, a warrant authorized the seizure of "books, records, pamphlets, cards, receipts, lists, memoranda, pcitures, recordings and other written instruments concerning the Communist Party of Texas." The Supreme Court held that the warrant was to braod, in violation of the Fourth Amendment particularity requirement. 379 U.S. at 478-80, 486. The Supreme Court stated: "[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain . . . . No less a standard could be faithful to First Amendment freedoms." 379 U.S. at 485 (citations and footnote omitted). The language of the instant warrants is similar to that in the Stanford v. Texas warrant.

In Zurcher the "scrupulous exactitude" standard was applied. The Supreme Court upheld the search of a newspaper's office for photgraphs of a violent clash between demonstrators and police at the Stanford University Hospital. The Court emphasized that the "scrupulous exactitude" standard does not erect a barrier to searches:

> [T]he prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search. As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant--probable cause, specificity with respect to the place to be searched and the items to be seized, the overall reasonableness--should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

436 U.S. at 565.

The government argues that the "scrupulous exactitude" standard is not applicable to the instant case. The government points out that the documents to be seized were not being sought for the ideas they contained, rather they were sought because they constituted indicia of membership in an organization appellants allegedly used for unlawful activities.[7] Stanford v. Texas specifically distinguished the books in that case from the type of books in the Dennis case: "A 'book' which is no more than a ledger of an enterprise thus might stand on a quite different constitutional footing from the books involved in the present case." 379 U.S. at 485 n.16.

Nevertheless, we conclude that First Amendment interests are involved in this

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[7]There is a sufficient nexus between the alleged illegal activity and the items to be seized. See pages 7-9, supra.

case and therefore the "scrupulous exactitude" standard is appropriate. We reach this conclusion for two reasons. First, in Stanford v. Texas, membership in the Communist Party was per se illegal, so seizure of some of the books involved there would have constituted indicia of membership in an organization which would be unlawful. The Supreme Court nevertheless require "scrupulous exactitude" for the particularity requirement. Second, although in this case the items were not seized for their ideas, as were the books in Stanford v. Texas, they were seized for the associations they demonstrated. Just as the ideas in a book are protected by the First Amendment, so are associations so protected. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958). Evidence of membership in a particular organization can severely affect the exercise of First Amendment rights, possibly

through reprisals in the community. NAACP, 357 U.S. at 462063. Admittedly, the Hells Angels is not as respected an organization as the NAACP. However, to ensure the protection of the associational rights of desirable organizations, it is necessary that warrants for searches for evidence of membership in bona fide organizations meet the Fourth Amendment requirements with scrupulous exactitude.[8] Analogously, the Supreme Court in formulating the "scrupulous exactitude" requirement in Stanford v. Texas, relied on Marcus v. Search Warrant, 367 U.D. 717 (1961), where the Court held that certain procedures had to be followed in the seizure of publications unprotected by the First Amendment (obscene

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[8]Not all associations of individuals implicate the right of association. For instance, we can find no cases finding criminal conspiracies themselves within the realm of the freedom of association. Here, it is membership in the Hells Angels, not membership in the alleged conspiracy, that is arguably protected.

publications) to ensure that protected publications were not seized or held for too long a period of time. 367 U.S. at 730-31, 737. The same rationale applies to organizations, requiring scrupulous exactitude to ensure that protected associations are not endangered. Thus, the possible implication of protected First Amendment associational rights in this case requires the scrupulous exactitude standard.

c. Application of the Law.

When we apply the particularity requirement with scrupulous exactitude, we conclude that the indicia warrants were inadequate. First, we note that even outside the First Amendment, a search for documents poses particular dangers:

> [T]here are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for

> physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized . . . . [R]esponsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.

Andresen, 427 U.S. at 482 n.11. In United States v. Bennett, 409 F.2d 888, 897 (2nd Cir. 1969), cert. denied, 396 U.S. 852 (1969), 402 U.S. 984 (1971), Judge Friendly put the concern this way:

> The reason why we shrink from allowing a personal diary to be the object of a search is that the entire diary must be read to discover whether there are incriminating entries; most of us would feel rather differently with respect to a "diary" whose cover page bore the title "Robberies I Have Performed." Similarly the abhorrence generally felt with respect to "rummaging" through the

> contents of a desk to find an incriminating letter would not exist in the same measure if the letter were lying in plain view.

The dangers of document searches described in Andresen and Bennett are present in the instant case: the warrants authorized searches for papers relating to Hells Angels activities, items with names of Hells Angels members, and telephone books with names and numbers of Hells Angels members. The dangers of document searches alone was not enough for the Supreme Court to find the warrant in Andresen invalid or for us to find the warrant in Dennis invalid; however, the "Scrupulous exactitude" standard triggered by First Amendment concerns was no involved in Andresen or Dennis.

Second, we are mindful of the proposition that a warrant must be as specific as possible. United States v. Wuagneux, 683 F.2d 1343, 1349 (11th Cir. 1982);

see Dennis, 625 F.2d at 792.[9]

Third, we believe that a high degree of specificity is particularly needed with an indicia warrant. The indicia warrants, like many warrants for searches for documents, authorized the perusal of almost any document in the subject's residence. The indicia warrants, like many warrants, authorized the search of nearly every corner of the residence. Unlike most warrants, these warrants were issued to obtain evidence on just one fact--membership in the Hells Angels. Unlike most warrants, the evidence on this issue would

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[9]United States v. Davis, 542 F.2d 743, 745 (8th Cir.), cert. denied, 429 U.S. 1004 (1976), which held that a warrant need not list the serial numbers of stolen currency, is consistent with the "as specific as possible" rule. In Davis, the serial numbers of only some of the stolen currency were known, so a listing of the serial numbers would not have limited the scope of the search. If all the serial numbers are known, they should be listed. United States v. Bright, 630 F.2d 804, 812 (5th Cir. 1980).

be needlessly cumulative once enough evidence was obtained to establish membership. While additional evidence would usually show the breadth of criminal activity, in the instant case additional evidence would at some point have no additional probative value in determining membership. Therefore, some of the items in the indicia warrant would do nothing to aid in the conviction. An indicia warrant allows an almost unlimited search for the purported purpose of obtaining evidence on a very narrow matter for which only a limited amount of evidence would be useful. As a result, there was a tremendous potential for abuse.[10] Given the potential for abuse, we feel the indicia sought should be specifically identified in the warrant, and if this is impossible there should be

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[10]We do not find that there was abuse in the instant case. See pages 20-21, infra.

an explanation as to why it is impossible and whether the non-specified items could actually aid in the conviction.

We are not asking law enforcement officials to assess exactly how much evidence is needed for a conviction. In the situation where fruits or instrumentality of crime are being sought, more evidence of this type would tend to show a broader scope of criminal activity. The same reasoning would apply to many types of "mere evidence." For instance, if documents are being sought to show that a suspect is loansharking, more documents would show a broader scope of criminal activity. And even when indicia are being sought just to prove membership, we would permit the accumulation of evidence when the items were specifically identified because the specific identification would help prevent a free-wheeling search into a person's possessions.

Part of the warrant in this case would meet this standard. The description of the jackets, the belt buckles, T-shirts, photographs,[11] and plaques and mirrors are sufficiently specific. If the warrants said no more they would be valid. But the search for "other items" with names of members, telephone books, and papers relating to the Hells Angels is too general for a search for indicia to prove membership in the Hells Angels. Such evidence would be unnecessarily cumulative. Such items may be seizable with more specific information. For instance, a search of a suspect's personal telephone book to see if alleged co-conspirators were listed would not be needlessly cumu-

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[11]Photographs could sometimes be the best evidence of indicia membership. Among the items seized in this case were snapshots that might be called Hells Angels team pictures. They show ten men standing behind a Hells Angels banner which is being held up by two of the men.

lative. However, the telephone books were not sought for such a purpose. The purpose of the search was simply to find indicia of membership. A search for indicia for the purpose of proving membership in an organization should be limited to specifically enumerated items whose relevance and probative value is shown.

The practical effect of the warrant in the instant case is that it was very close to a general warrant. We will require that such a broad warrant for such a narrow purpose specifically enumerate the items to be seized or at least explain why a more specific showing cannot be made and why the evidence is needed.

3. Probable Cause

Appellants next argue that the indicia warrants lacked probable cause. They argue that the indictment, which was incorporated by reference into the application for the search warrant, did not provide a

basis for the search warrant and there was not probable cause to believe the indicia would be found at the searched premises. We find there was probable cause for the warrants.

Probable cause to search requires (1) a finding of probability of criminal activity, and (2) a finding or probability of concealment of evidence on specific premises. United States v. Deggendorf, 626 F.2d 47, 51 (8th Cir.), cert. denied, 449 U.S. 986 (1980). The indictment satisfied the first element, providing the probable cause for criminal activity. The Supreme Court has held that an arrest warrant can be based on an indictment "because the grand jury's determination that probable cause existed for the indictment also establishes that element for the purpose of issuing a warrant for the apprehension of the person so charged." Giordenello v. United States, 357 U.S. 480, 487 (1958).

More recently the Supreme Court has stated:

> [A]n indictment, 'fair upon its face,' and returned by a 'properly constitued grand jury, conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry. The willingness to let a grand jury's judgment substitute for that of a neutral and detached magistrate is attributable to the grand jury's relationship to the courts and its historical role of protecting individuals from unjust prosecution.

Gerstein v. Pugh, 420 U.S. 103, 117 n. 19 (1975) (citations omitted). If an indictment can be used to establish the probability of criminal activity for an arrest warrant we see no reason why an indictment should not be able to establish probability of criminal activity for a search warrant. Of course, before a search warrant can be issued, the second prong--probability of concealment of evidence at a specific premises--must be met. Appellants challenge the warrant on this basis as well.

We agree with the district court that this contention has little merit. Probable cause to believe Hells Angels indicia was based on several factors. Appellants' associations with the Hells Angels were based in part on the indictment which alleged that Fitzgerald was a widow of a Hells Angels member and the other appellants were Hells Angels members at the time of the indictment. Appellants' links to the particular residences to be searched were based in part on official records, such as utility records in the case of Apker, land ownership records in the case of Gearhart, and postal records in Fitzgerald's case. Other support for the search warrant came from confidential informants. The affidavit in the application for the search warrants said the confidential informants, who were proved reliable in the past and based their information on personal know-

ledge, had observed Davenport's Hells Angels colors at the fourth searched premises and the informants said Apker, Davenport, and Gearhart were Hells Angels members. Most of the remainder of the support observations of unnamed police officers that vehicles registered to or driven by each appellant were seen at the respective searched residences. The affidavit also said police officers observed that Fitzgerald's husband had received a Hells Angels funeral and she had retrieved his Hells Angels ring and belt buckles.

The affidavit clearly provided ample support for the search warrants. This was buttressed by the observation of police officers, who are entitled to a presumption of credibility when they are the unnamed informants in an affidavit supporting a search warrant application. United States v. Beusch, 596 F.2d 871, 874 (9th Cir. 1979); United States v. Harrick, 582

F.2d 329, 332 (4th Cir. 1978); see United States v. Ventresca, 380 U.S. 102, 111 (1965). The information from the informants alone could have support the search warrant, because their credibility was shown by their record for reliability and their personal knowledge. United States v. Fleming, 566 F.2d 623, 625 (8th Cir. 1977). When all the factors are considered there was clearly probable cause to believe the indicia would be found at the designated residences.

4. Pretext.

The last Fourth Amendment argument of appellants is that the indicia warrants were obtained merely as a pretext for a general search for guns and drugs. Appellants argue that the true purpose of the search was not disclosed to the magistrate issuing the warrant. The true purpose was shown by the presearch meeting at which officers were told to be on the lookout for

guns and drugs and the fact that machinery was set up to quickly issue state search warrants.

The scope of a search is limited by its authorization. Walter v. United States, 447 U.S. 649, 656 (1980). "The search must be one directed in good faith toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged has been committed. It must not be a general exploratory search . . . ." Gurleski v. United States, 405 F.2d 253, 258 (5th Cir. 1968), cert. denied, 395 U.S. 977, 981 (1969), cited with approval in United States v. Rettig, 589 F.2d 418, 423 (9th Cir. 1978).

Appellants' allegations are not frivolous, particularly when on considers the manpower and time devoted to the searches and the very limited probative value of the items sought under the indicia warrants. See pages 16-18, supra. Compare Rettig,

589 F.2d at 421 (indicia of residence in a household sought under warrant which also authorized seizuire of marijuana). However, the ture purpose or bad faith of the police is a question of fact, and the district court's findings of fact on a motion to suppress are ordinarily subject to the clearly erroneous standard of review. United States v. Williams, 604 F.2d 1102, 1121 (8th Cir. 1979). The district court found that the manner of execution of the warrants (as opposed to the warrants on their face) did not make for a general search. Implicit in this finding is the finding that law enforcement officers did not use the indicia warrants as a pretext to search for items other than those specified in the warrant. In light of the justifications for the presearch meeting put forth by the government, such as the need to point out that the persons to be arrested had firearm disabilities, we do

not find the district court's conclusion clearly erroneous.

B. First Amendment.

Appellants argue that the indicia warrants were invalid under the First Amendment as well as the Fourth Amendment. They argue that the warrants infringed their right of association.

As we stated previously, there was a sufficient nexus between the items to be seized and criminal behavior to justify a search warrant. The Supreme Court said in Zurcher: "[T]he prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interest would be endangered by the search." 437 U.S. at 565.

There is some support for appellants' position in another line of cases highlighted by NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), and Gibson v.

Florida Legislative Investigation Committee, 371 U.S. 539 (1963). In these cases the Supreme Court reversed contempt convictions of person who refused to produce NAACP membership lists based on the members' associational rights. In NAACP, the State of Alabama brought an equity suit to oust the NAACP from Alabama. In the course of the action the trial court ordered the NAACP to produce many of its records, including its membership lists. The NAACP refused to produce the membership lists and was held in contempt. The Supreme Court reversed, finding that Alabama had not show a compelling state interest to justify subordination of First Amendment associational rights. 357 U.S. at 463, 466. In Gibson the president of the Miami, Florida branch of the NAACP refused to bring membership lists to a committee hearing to assist him in answering questions on whether fourteen alleged Commun-

ists were members of the Miami NAACP. Gibson was held in contempt for this refusal. The Supreme Court held there was not a sufficient nexus between the membership list and a compelling state interest in investigating Communists to justify compelled disclosure. 372 U.S. at 546, 554-57. Appellants argue that they are entitled to the protection offered by these cases.

The compelling state interest test articulated in NAACP and Gibson would appear to be more protective than the tests applied for the Fourth Amendment. Also, we are not inclined to see the distinction between contempt judgments and search warrants important in this particular context; the harm to associational rights would be the same whether the membership lists were outlined by the threat of a contempt judgment or by means of a search warrant. However, other factors make the NAACP

cases inapplicable to the instant case.

First, the NAACP cases deal with mebership lists only. Therefore, these cases are relevant only as to that part of the warrants authorizing seizure of membership lists. Second, in the NAACP cases there was evidence that harm would result from disclosure of the membership list. NAACP, 357 U.S. at 462-63; Gibson, 372 U.S. at 548 n.3. In the instant case we are dealing with a group whose members sometimes publicly identify themselves as Hells Angels members by their dress, so additional harm from disclosure of membership lists is unlikely. Third, it is very possible that the state could meet the compelling state interest test in the instant case. The Supreme Court has upheld compelled disclosure of Klu Klux Klan membership lists, taking judicial notice of the Klan's unlawful activities. New York ex rel. Bryant v. Zimmerman, 278 U.S.

63, 75-77 (1928) distinguished in NAACP, 357 U.S. at 465-66. In a post-NAACP case, the Supreme Court upheld compelled disclosure of the membership list of the Communist Party of the United States because the Subversive Activities Control Board could rationally conclude that the Communist Party used violent means to destroy government. Communist Party of the United States v. SACB, 367 U.S. 1, 90-105 (1961). See also L. Tribe, American Constitutional Law § 12-23, at 708 (1978).

Because of our disposition of the Fourth Amendment issue, we need not determine the potential harm from Hells Angels membership disclosure or whether there is a sufficient state interest to justify membership disclosure. On the record before us, however, appellants clearly have not made out a First Amendment claim requiring invalidation of the part of the warrants authorizing searches for member-

ship lists.

III. Suppression of the Evidence

The government argues that even if the indicia warrants were invalid, the guns admitted against three of the appellants were admissible because they were properly seized during execution of the arrest warrants or were seized or would have been seized pursuant to state search warrants.

During the execution of arrest warrants for Apker, Davenport, and Gearhart, law enforcement officers observed suspected controlled substances in plain view, and as a result they obtained a state search warrant for each premises. Officers saw the suspected controlled substances at Apker's residence while conducting a "sweep search," i.e., a search for the purpose of looking for persons at the premises who might present a security risk. United States v. Briddle, 436 F.2d 4, 6-8 (8th Cir. 1970), cert. denied, 401 U.S.

921 (1971). At the residence where Davenport was found, officers saw the suspected drugs in the kitchen when they followed Davenport into the kitchen to get his clothes. Police have a right to accompany a person under custodial arrest in his residence. Washington v. Chrisman, 455 U.S. 1, 6-7 (1982). At Gearhart's residence police were searching Gearhart's bedroom for weapons before allowing an undressed woman to get dressed in the privacy of the bedroom.[12] There is no question that the discovery of the suspected controlled substances at each residence was proper and that therefore the state search warrants were valid. Nothing was discovered during the sweep search at Fitzgerald's residence and no state search warrant was obtained for that residence.

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[12]After the guns were found police told her to get dressed in the bathroom.

The record does not make clear which guns were seized pursuant to the invalid federal warrants before the state warrants were obtained. The government argues that this question need not be resolved because even if the guns were obtained under the invalid indicia warrants, it is enough that they would have been seized under the valid state warrants.

The government's position is based on the "inevitable discovery" exception to the exclusionary rule. This exception allows illegally obtained evidence to be admitted if it would have been discovered in the course of a proper investigation. C. Wright , Federal Practice and Procedure, § 408, at 453-55, § 677, at 794-95 (1982). The Supreme Court has not explicitly passed on this eception, id., nor have we. United States v. Kelly, 547 F.2d 82, 85-86 (8th Cir. 1977). The First, Second, Third, Fifth, Seventh, Ninth and Eleventh Circuits

have adopted the inevitable discovery exception. United States v. Bienvenue, 632 F.2d 910, 913-14 (1st Cir. 1980); United States v. Ceccolini, 542 F.2d 136, 140 (2nd Cir. 1976), rev'd on other grounds, 435 U.S. 268, 273 (1978); Government of Virgin Islands v. Gereau, 502 F.2d 914, 927-28 (3rd Cir. 1974), cert. denied, 420 U.S. 909 (1975), 424 U.S. 917 (1976); United States v. Brookins, 614 F.2d 1037, 1042, 1042 n.2 (5th Cir. 1980);[13] United States ex rel. Ownes v. Twomey, 508 F.2d 858, 865-66 (7th Cir. 1974); United States v. Kandik, 633 F.2d 1334, 1336 (9th Cir. 1980). Only the Sixth Circuit has explicityly rejected the inevitable discovery exception. United States v. Griffin, 502 F.2d

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[13]This case would be controlling for the Eleventh Circuit as well, because the Eleventh Circuit follows the precedent of the old Fifth Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (1981).

959, 961 (6th Cir.), cert. denied, 419 U.S. 1050 (1974).

The inevitable discovery exception usually arises in a slightly different context than the one in this case. Ordinarily the element that made the seizure illegal was a prior illegality, i.e., the seizure in question was illegal because it was "the fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 484-88 (1963). In the instant case the seizure was illegal because the warrant was invalid and not because of a prior illegality. However, we do not see a basis for distinguishing between the causes of the illegality. In fact, the policy behind the exclusionary rule supports application of the "inevitable discovery" exception to this case more than it supports another exception to the exclusionary rule. In Wong Sun Justice Brennan stated the exclusionary rule does

not apply when the "connection between the lawless conduct of the police and the discovery of the challenged evidence has 'become so attenuated as to dissipate the taint.'" 371 U.S. at 487, quoting Nardone v. United States, 308 U.S. 338, 341 (1939). The Court refused to apply a "but for" test; the fact that the evidence would not have come to light but for the illegal actions of police does not require exclusion. Id. at 487-88. In the instant case the evidence passes the "but for" test; regardless of illegal police conduct, the evidence would have been discovered.

Furthermore, the deterrent effect of the exclusionary rule would remain because at the time police engage in an illegal search they would not know whether or not a latter, legal discovery was inevitable. For instance, a police officer would not feel free to conduct a warrantless search while his partner is seeking a warrant.

The officer would not know whether the warrant would be issued and what the scope of the search allowed by the warrant would be. Also, in this case the time lapse between execution of the federal and state warrants was only a couple of hours.

Therefore, we join the great majority of the circuits and apply the inevitable discovery rule. In this case the illegal warrant clearly did no more than hasten the discovery of the guns. We do not think that probative evidence should be excluded merely because an invalid warrant affected the timing of the discovery of the evidence. The guns admitted against Apker, Davenport, and Gearhart would be admissible under the inevitable discovery exception to the exclusionary rule. The government admits that if the indicia warrants are invalid no weapons would be admissible against

Fitzgerald.[14]

Another question relating to the suppression of the evidence is whether we should sever the general parts of the warrant and suppress only those items which could not have been seized pursuant to the specific parts of the warrant. This is the approach suggested by the dissent.

The approach of severing the general parts of a warrant, rather than considering the entire warrant invalid, has been embraced by four circuits, although in a more narrow version than that suggested by the dissent. United States v. Riggs, 690 F.2d 298 (1st Cir. 1982); United States v. Christine, 687 F.2d 749 (3d Cir. 1982);

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[14] Three guns were found in a bedroom at Fitzgerald's residence while the indicia warrant was being executed. A pistol was found in a woman's coat pocket in the closet. A rifle was behind a dresser and a shotgun was in the closet.

United STates v. Cardwell, 680 F.2d 75 (9th Cir. 1982); United States v. Cook, 657 F.2d 730 (5th Cir. 1981). Although these courts accepted the severance approach in principle, no court has permitted the admission of items found in plain view while executing the specific parts of the warrant. We would have to adopt an expansive, plain view-severance approach to allow the guns to be admitted in this case. In Riggs and Cook, the courts were addressing the admissibility of items which were specifically described in the warrant. In Christine, a concurring judge would have adopted the plan view-severance approach, but the majority did not adopt that rule. In Cardwell, the severance approach was embraced only in dicta; the court did not discuss a plain view extension.

The version of the plain view extension suggested by the dissent is particularly expansive. There is nothing in the

record to show whether the police found the guns at defendants' residences when they were looking for the specific items or the general items. Nevertheless, the dissent would exclude evidence only if it "could not have been seized" pursuant to the specific parts of the warrant. This is an unnecessary expansion of the severance rule adopted by several circuits, and could lead to what in effect would be a general warrant.

A plain view-severance approach is particularly inappropriate with indicia warrants. Indicia warrants by their nature are potentially subject to abuse. See p. 16, supra. Pretext can at times go undetected by a magistrate, and the possibility of an almost unlimited search may be too tempting for law enforcement officials. The effect of adopting a plain view-severance approach could be to uphold seizures pursuant to all but the most general indicia warrants. Therefore, we reject

that approach in this case.

IV. Joinder of the Conspiracy Count

Appellants arge they were irremediably prejudiced by the joinder at trial of the conspiracy count and the other charges. Most of the trial was devoted to the conspiracy count, with much of the evidence being conditionally admitted. The district court conditionally admitted the testimony of alleged co-conspirators pending the court's determination of whether a conspiracy was proved by a preponderance of the independent evidence. The district court eventually found that a conspiracy had not been show, so it ordered the evidence stricken. The court dismissed the conspiracy counts at the close of the government's case. Appellants argue that the evidence as to the conspiracy dominated the trial and was extremely inflammatory and prejudicial, making the only proper remedy judgment of acquittal or

dismissal on the non-conspiracy counts. Appellants moved for dismissal or judgment of acquittal at the close of the government's case, which we will assume arguendo was implicitly a motion for relief from prejudicial joinder pursuant to Fed. R. Crim. P. 14.

We do not think that the district court erred in refusing to order a new trial for appeallants, much less in not ordering dismissal or judgment of acquittal. The conspiracy evidence was conditionally admitted pending production of independent evidence of a conspiracy. We explicitly approved such procedures in United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978). Although the court could have required that the independent evidence of conspiracy be produced first, United States v. Macklin, 573 F.2d 1046, 1049 n.3 (8th Cir. 1978) it is in the district court's discretion to determine which procedure

to use. Id. The district court's conclusion that the evidenc from the conspiracy count was not irremediably prejudicial was reasonable from the perspective of this appeal. The conditionally admitted evidence went almost entirely to drug dealings, and the convictions for drug possession have not been appealed. No evidence was admitted on the most inflammatory part of the conspiracy charge--murder and torture--although the government did make a reference to this in its opening statement. An order for a mistrial is in the district court's discretion, United States v. Wade, 467 F.2d 1226, 1229 (8th Cir. 1972), cert. denied, 410 U.S. 933 (1973), as is an order for relief from prejudicial joinder under Fed. R. Crim. P. 14. United States v. Sanders, 563 F.2d 379, 384 (8th Cir. 1977), cert. denied, 434 U.S. 1020 (1978). The district court did not abuse its discretion in believing

cautionary instructions were adequate rather than ordering a mistrial, dismissal, or judgment of acquittal.

V. Sufficiency of the Evidence

Appellants argue that the evidence was insufficient to sustain a conviction. Their primary argument is that evidence of constructive possession was inadequate when one considers that each appellant was not alone in the house where the guns were found and appellants' fingerprints were not on the guns. We find the evidence sufficient as to Apker, Davenport, and Gearhart.[15]

When we bear in mind the general standards, it is easy to see that the evidence is sufficient to sustain the verdicts against Apker, Davenport, and Gearhart. As

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[15] We need not address the sufficiency of the evidence as to Fitzgerald; her conviction must be reversed because the guns found at her residence are not admissible.

we said in Durns v. United States, 562 F.2d 542 (8th Cir.), cert. denied, 434 U.S. 959 (1977):

> On appellate review of the sufficiency of the evidence, the court must view the evidence in the light most favorable to the verdict rendered. It must accept as established any and all reasonable inferences from the evidence that tend to support the jury's verdict. The evidence need not "exclude every reasonable hypothesis except that of guilt[; it is enough] that it be sufficient to convince the jury beyond a reasonable doubt that the defendant is guilty."

Id. at 545-46 (citations omitted). A conviction for possession of a firearm by a felon can be based on constructive possession or joint possession. United States v. Polk, 574 F.2d 964, 965 (8th Cir.), cert. denied, 439 U.S. 849 (1978). Constructive possession can be established by a showing that the firearm was seized at the defendant's residence. Id.

As to Apker, he was arrested at a home he shared with Patricia Weeks and her twelve-

and thirteen-year-old children. His Hells Angels colors were in the bedroom and the gun was found in a shaving kit in the bedroom. With his Hells Angels colors in the house and the fact that the gun was in a shaving kit, the jury could reasonably conclude that the gun was constructively possessed by Apker.

As to Davenport, three firearms were found at Mary Spethman's residence. A dog license in Davenport's name gave Spethman's house as his address. The weapons were in the bedroom, the only room with an unmade bed. One of the guns was found in a dresser drawer with Hells Angels T-shirts. The evidence is adequate to show possession by Davenport, especially with regard to the gun found with the T-shirts.

Davenport also complains about a comment made by the prosecutor in his summation relating to the evidence against Davenport. The prosecutor said there was no evidence

that Mary Spethman was a member of the NRA [National Rifle Association]. We do not believe this statement was an improper comment on Davenport's failure to testify. It did not violate his right against self-incrimination or shift the burden of proof to the defendant because the comment did not refer to a matter about which only Davenport could testify. United States v. Hagar, 505 F.2d 737, 740 (8th Cir. 1974). Furthermore, the district court ordered the jury to disregard the comment, and the court has broad discretion in dealing with closing arguments. United States v. Young, 618 F.2d 1281, 1289 (8th Cir.), cert. denied, 449 U.S. 844 (1980). We find no abuse of discretion here. As to Gearhart, he was arrested at a residence he shared with Tracy Nadrchal. Utility bills indicated he lived there. There were two guns under the mattress, two in a bedroom closet, two on top of a hutch

in the bedroom, and seventeen inside a nailed-shut wooden crate in the living room. Again, a jury could reasonably conclude Gearhart possessed some or all of the weapons. The evidence is sufficient to sustain the convictions of Apker, Davenport, and Gearhart.

## VI. Conclusion

The indicia warrants in this case were too broad to meet the particularity requirement of the Fourth Amendment in light of the First Amendment associational interests involved. Nevertheless, the guns which were or may have been seized pursuant to the invalid indicia warrants are admissible against Apker, Davenport, and Gearhart because it was inevitable that the guns would have been discovered during the execution of the valid state search warrants. Therefore, the convictions of Apker, Davenport, and Gearhart are affirmed. There is no basis for not

applying the exclusionary rule to the guns found at Fitzgerald's residence, so her conviction is reversed and her case remanded to the district court.

Affirmed in part; reversed in part.

BRIGHT, Circuit Judge, concurring in part and dissenting in part.

I concur in affirming the convictions of Apker, Davenport, and Gearhart, but would also affirm appellant Fitzgerald's conviction. In affirming, however, I would not adopt the "inevitable discovery rule" as grounds for curing the defective warrants. In the context of this case, where the federal warrants are only partially flawed, and where the nature of the flaw is a failure to comply with the particularity requirement, I would sever the valid portions of the warrants and suppress only those items which could not have been seized pursuant to a legitimate execution of the valide portions of the warrants.

As the majority finds on page 17 of its opinion, the warrants described with sufficient specificity the jackets, belt buckles, T-shirts, photographs, plaques, and mirrors that were sought by the police. Continuing, the majority notes that "[i]f the warrants said no more they would be valid. The majority holds the warrants invalid, however, because the warrants also include items that are not described with sufficient particularity.

As an alternative to applying the inevitable discovery rule, I would apply the remedy of partial suppression, adopted most recently by the First Circuit in United States v. Riggs, 690 F.2d 298 (1st Cir. 1982), a case that also involves items protected by the first amendment. In concluding that partial suppression remedied the warrant's flaws, the Riggs court noted the reasoning of Professor LaFave:

> [I]t would be harsch medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well . . . . It would be ironic, to say the least, if the efforts of the police to therefore "advise the court of everything which conceivably might be found in the premises" should result in the warrant being declared invalid in its entirety. [Id. at 300 (quoting 2 W. LaFave, Search and Seizure § 4.6(f) at 111-12 (1978)).]

The Third, Fifth, and Ninth Circuits have also adopted the remedy of partial suppression. United States v. Christine, 687 F.2d 749 (3d Cir. 1982); United States v. Cook, 657 F.2d 730 (5th Cir. 1981); see United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982) (accepting partial suppression but finding no portion of the warrant sufficient to withstand the particularity and probable cause requirements).

A logical and just extension of that rule is to admit those items, such as guns in this case, which could have been discovered in plain view pursuant to execution of the valid portions of the warrants. Indeed, if the warrants had authorized only a search for a jacket, and the guns had been found in plain view pursuant to a search for the jacket, a sufficient number of the guns discovered in this case would have been admissible to sustain the convictions.

That partial suppression does not weaken the particularity requirement is evidence by the Ninth Circuit's holding in United States v. Cardwell, supra, 680 F.2d at 79. If no part of a warrant can be salvaged because no severable part refers to an item with specificity and probable cause, then all of the materials seized under the defective warrant must be suppressed. Id.

Nor does this approach invite abuse through use of warrants describing one thing for purposes of searching for another. The warrants mush still meet the probable cause requirement. Moreover, the warrants must still be executed in a manner consistent with the authorization given the officers in the warrant.

The same protections cannot be assured in applying the inevitable discovery rule, which, in my opinion, invites standardless conjecture in hypothesizing whether or not police, during a routine police investigation, would inevitably have discoverd the evidence.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

| | |
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| No. 82-1168/1169/1201 | September Term 1982 |
| United States of America, Appellee, vs. Gary D. Apker, Calvin Davenport, Raymond Gearhart, Appellants. | Appeals from the United States District Court for the District of Nebraska |

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

August 8, 1983

Office-Supreme Court, U.S.
FILED
DEC 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-600

# In the Supreme Court of the United States

OCTOBER TERM, 1983

GARY D. APKER, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether firearms discovered in plain view during searches of petitioners' residences were properly admitted at trial, notwithstanding the court of appeals' conclusion that the searches were conducted pursuant to search warrants that, in part, did not satisfy the particularity requirement of the Fourth Amendment.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 17 |
| Appendix | 1a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Berenyi* v. *Immigration Director*, 385 U.S. 630 | 17 |
| *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1 | 10 |
| *Coolidge* v. *New Hampshire*, 403 U.S. 443 | 16 |
| *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 | 10 |
| *Nix* v. *Williams*, cert. granted, No. 82-1651 (May 31, 1983) | 8 |
| *Stanford* v. *Texas*, 379 U.S. 476 | 9 |
| *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983) | 16 |
| *United States* v. *Cardwell*, 680 F.2d 75 | 11 |
| *United States* v. *Christine*, 687 F.2d 749 | 11 |
| *United States* v. *Christophe*, 470 F.2d 865 | 15 |
| *United States* v. *Cook*, 657 F.2d 730 | 11 |
| *United States* v. *Cutts*, 535 F.2d 1083 | 16 |
| *United States* v. *Fitzgerald*, No. 82-1242 (8th Cir. Dec. 7, 1983) | 5, 11, 12, 13 |
| *United States* v. *Freeman*, 685 F.2d 942 | 12 |
| *United States* v. *Griffin*, 502 F.2d 959, cert. denied, 419 U.S. 1050 | 8, 15-16 |
| *United States* v. *Looney*, 481 F.2d 31 | 15 |
| *United States* v. *Riggs*, 690 F.2d 298 | 11 |
| *United States* v. *Rubio*, 703 F.2d 1124 (advance sheets) | 8, 9, 10 |
| *Warden* v. *Hayden*, 387 U.S. 294 | 10 |
| *Washington* v. *Chrisman*, 455 U.S. 1 | 15 |
| *Zurcher* v. *Stanford Daily*, 436 U.S. 547 | 9 |

Constitution and statutes: Page

U.S. Const.:
Amend. I ..... 4, 8, 9, 11
Amend. IV ..... 4
18 U.S.C. App. 1202(a)(1) ..... 2, 7
21 U.S.C. 844 ..... 2

Miscellaneous:
2 W. LaFave, *Search and Seizure* (1978) ..... 11, 12

# In the Supreme Court of the United States

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A71) is reported at 705 F.2d 293. The opinion of the court of appeals sitting en banc in the case of one of petitioners' co-defendants (App., *infra*, 1a-18a) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on April 19, 1983. A petition for rehearing was denied on August 8, 1983. The petition for a writ of certiorari was filed on October 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

After a jury trial in the United States District Court for the District of Nebraska, petitioners were each convicted of unlawfully possessing a firearm, in violation of 18 U.S.C. App. 1202(a)(1), and of possessing a controlled substance, in violation of 21 U.S.C. 844. Each was sentenced to consecutive prison terms of two years on the firearms counts and one year on the drug counts. Petitioners did not challenge their drug convictions, and the court of appeals affirmed their firearms convictions (Pet. App. A1-A71).

1. The pertinent facts are summarized in the court of appeals' opinion. On February 18, 1981, a grand jury in the District of Nebraska returned a three-count indictment against petitioners and seven other persons alleging that they were members or associates of the Hells Angels of Omaha and that, as such, they were involved in a conspiracy to distribute methamphetamine and to gain a monopoly on the methamphetamine traffic in Omaha, using threats, beatings, torture, and murder against their competitors (Pet. App. A4-A5).

After the indictment was returned, federal authorities obtained arrest warrants for each of the defendants named in the indictment and "indicia search warrants" for premises alleged to be the residences of some of the defendants (Pet. App. A5). The search warrants did not relate to contraband or fruits and instrumentalities of crime (*ibid.*). Rather, they authorized the seizure of indicia of membership in the Hells Angels, including jackets with the Hells Angels insignia; belt buckles and T-shirts with "Hells Angels" printed on them; plaques, mirrors and "other items" giving the names of Hells Angels members; photographs depicting Hells Angels members;

telephone books listing the telephone numbers of Hells Angels members; and certain papers and records relating to the Hells Angels (*id.* at A5-A6). The affidavit supporting the search warrants stated that the indicia of membership were necessary because proof of defendants' association with the Hells Angels tended to establish their participation in the Hells Angels drug conspiracy charged in the indictment (*id.* at A6-A7).

On February 28, 1981, teams of federal and state law enforcement officers executed the arrest and search warrants (Pet. App. A7). Before doing so, the officers were informed that petitioners had felony convictions and therefore could not lawfully possess firearms (*ibid.*). The officers were told to be on the lookout for guns and drugs and that a judge would be standing by to issue state search warrants if drugs were observed (*ibid.*).

The officers arrested petitioner Apker pursuant to the arrest warrant at the residence he shared with Patricia Weeks (Pet. App. A63). They observed suspected controlled substances in plain view while conducting a "sweep search" of the premises for the purpose of ascertaining the presence of persons who might present a security risk (*id.* at A49). During the subsequent search conducted pursuant to the indicia warrant, the officers found a gun in a shaving kit in the bedroom (*id.* at A64).

Petitioner Davenport was arrested pursuant to the arrest warrant at the residence he shared with Mary Spethman (Pet. App. A64). The officers observed suspected drugs in the kitchen when they followed Davenport there to get his clothes (*id.* at A50). During the search of the bedroom, they found three weapons (*id.* at A64).

The officers arrested petitioner Gearhart pursuant to the arrest warrant at the residence he shared with Tracy Nadrchal (Pet. App. A65). They found guns and suspected narcotics while searching Gearhart's bedroom for weapons before allowing an undressed woman to get dressed in the privacy of the bedroom (*id.* at A50).

The discovery of drugs at the three residences led to the issuance of state search warrants, which were executed the same morning (Pet. App. A8).[1]

2. On appeal, petitioners contended, among other things, that the firearms were improperly admitted at their trial because the "indicia search warrants" were invalid under both the First and Fourth Amendments. The court of appeals rejected petitioners' argument that the warrants, insofar as they authorized searches for Hells Angels membership lists, infringed petitioners' First Amendment right of association (Pet. App. A44-A49). The court nevertheless took cognizance of petitioners' First Amendment interests by invoking a "scrupulous exactitude" standard for judging the validity of the search warrants under the Fourth Amendment (*id.* at A23-A29). Applying that standard, the court agreed with petitioners that the indicia warrants were invalid insofar as they failed sufficiently to particularize certain of the items to be seized, namely, the telephone books, papers, and "other items" (*id.* at A29-A36).

Although it ruled that the indicia warrants were invalid, the court of appeals upheld the admissibility of the firearms under the inevitable discovery doctrine

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[1] As a result of the discovery of the guns and narcotics, the grand jury returned a superseding indictment charging petitioners with the narcotics and firearms offenses of which they were convicted (Pet. App. A8).

(Pet. App. A49-A55). The court reasoned that the officers had observed drugs in plain view while conducting protective "sweep searches" pursuant to execution of the valid federal *arrest* warrants, that the officers' observations during the sweep searches led them to seek state search warrants to look for more drugs, and that they inevitably would have found the firearms while executing the state search warrants (*ibid.*).

The panel refused to apply the inevitable discovery doctrine to firearms found at the residence of one of petitioners' co-defendants, Janice Fitzgerald. Stating that no drugs or other evidence of crime had been found during the sweep search of Fitzgerald's residence, and that the officers therefore did not obtain a state search warrant for her residence, the court reasoned that the firearms seized there were found only by virtue of the overbroad federal indicia warrant. Pet. App. A50, A55-A56.[2]

A majority of the panel rejected the government's argument that it should sever any unlawfully general parts of the federal search warrant and uphold the admissibility of the firearms found at Fitzgerald's residence on the basis that the officers observed them in plain view while executing the specific parts of the warrant (Pet. App. A56-A59). Recognizing that a number of courts have approved severance,

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[2] Although the court held otherwise, it now appears that suspected controlled substances *were* observed while the officers were conducting a sweep search of Fitzgerald's residence and that the officers thereupon sought and obtained a state search warrant for her residence. See *United States* v. *Fitzgerald*, No. 82-1242 (8th Cir. Dec. 7, 1983) (en banc) (Gibson, Floyd R., J., concurring) (App., *infra*, 9a-12a). The court of appeals' en banc decision in *Fitzgerald* is discussed in more detail below.

so as to permit the admission of items seized pursuant to valid portions of a warrant rather than excluding all evidence seized under the warrant, the court nevertheless concluded that severance was inappropriate here because the government was not seeking to admit items that had been specifically identified in the valid portions of the warrant, but was instead relying on the valid portions of the warrant as a basis for the admission of other items (the firearms) found in plain view while executing the valid portions of the warrant. The court concluded that this "plain view-severance" approach was too expansive because there was nothing in the record to show whether the officers discovered the firearms when they were looking for the specific items identified in the indicia warrant or the general items (*id.* at A57-A58). Accordingly, Fitzgerald's conviction was reversed (*id.* at A66-A67).[3]

Judge Bright, concurring in part and dissenting in part, would have severed the invalid portions of the indicia warrants and suppressed only those items that could not have been seized pursuant to a legitimate execution of the valid portions of the warrants (Pet. App. A67). Applying this approach, Judge Bright concluded that "if the warrants had authorized only a search for a jacket, and the guns had been found in plain view pursuant to a search for the jacket, a sufficient number of the guns discovered in this case would have been admissible to sustain the convictions" (*id.* at A70).

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[3] In response to the government's petition for rehearing, the court of appeals has since vacated the panel opinion with respect to Fitzgerald and affirmed her conviction, employing the severance approach advocated by the government (App., *infra*, 4a-5a). See page 7 & note 4, *infra*.

On rehearing en banc in Fitzgerald's case, the court of appeals adopted Judge Bright's approach of severing the valid portions of the indicia warrant from the impermissibly general portions and concluded that the weapons were found at Fitzgerald's residence while the officers were executing the valid portions of the warrant. App., *infra*, 1a-18a. Accordingly, the court reinstated Fitzgerald's conviction.[4]

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[4] Writing for himself and Chief Judge Lay, Judge Bright was of the view that only one of the three weapons seized from Fitzgerald's residence was found in a place where the officers clearly had a right to search for the purpose of executing the valid portions of the indicia warrant. With respect to the other two weapons, Judge Bright and Chief Judge Lay concluded that the record failed to disclose sufficient information to support the conclusion that those weapons were found during the execution of the valid portions of the indicia warrant. Nevertheless, they agreed that Fitzgerald's conviction should be affirmed "because possession of one weapon is enough to support a conviction under [18 U.S.C.] § 1202(a)(1)." App., *infra*, 8a. Moreover, they concluded that, in the context of this case, "the trial court's admission of the [other two weapons] into evidence must be deemed harmless error" (*ibid.*).

A majority of the court (Judge Arnold, joined by Judges Ross, John R. Gibson, Fagg, and Bowman) concluded that all three weapons were properly discovered during the execution of the valid portions of the indicia warrant. App., *infra*, 12a.

Senior Judge Floyd R. Gibson concurred in the result, but he would have affirmed Fitzgerald's conviction on the same grounds used to affirm petitioners' convictions, to wit, that the firearms would inevitably have been discovered in the course of executing a valid state search warrant for drugs. App., *infra*, 9a-12a.

Finally, Judges Heaney and McMillian dissented, believing that the search of Fitzgerald's residence pursuant to the indicia warrant was in reality a pretext for a general search for any evidence of crime. App., *infra*, 13a-18a.

## ARGUMENT

The court of appeals upheld the admissibility of the firearms against petitioners under the inevitable discovery doctrine, reasoning that, regardless of the partial invalidity of the federal search warrants, the guns subsequently would have been found during execution of the valid state search warrants. Petitioners contend (Pet. 15-16, 18-19) that the court's invocation of the inevitable discovery doctrine here conflicts with *United States* v. *Griffin*, 502 F.2d 959, 961 (6th Cir.), cert. denied, 419 U.S. 1050 (1974). In fact, no such conflict exists, and this is clearly an appropriate case in which to apply the inevitable discovery doctrine. We recognize, however, that the scope of the inevitable discovery doctrine is presently before the Court in *Nix* v. *Williams*, cert. granted, No. 82-1651 (May 31, 1983); accordingly, if petitioners' convictions could be sustained only on the basis of that doctrine, it might be appropriate for the Court to hold the present petition pending a decision in *Williams*. In our view, however, the "plain view-severance" approach adopted by the court of appeals sitting en banc in Fitzgerald's case provides a valid, independent basis upon which to sustain petitioners' convictions. We therefore submit that it is unnecessary to hold the present petition pending the decision in *Williams*.

1. Preliminarily, petitioners contend (Pet. 11-15) that the federal search warrants were invalid in toto because they violated their First Amendment right of association. They rely on the decision of a Ninth Circuit panel in *United States* v. *Rubio*, which was published in the advance sheets at 703 F.2d 1124 (1983), but which the Ninth Circuit has withrawn pending a decision on the government's petition for

rehearing en banc. Accordingly, there is at present no conflict between this case and *Rubio* warranting this Court's review.[5]

At all events, the indicia warrants did not violate the First Amendment. Search warrants are not altogether forbidden merely because First Amendment interests might be implicated; rather, "[w]here the materials sought to be seized may be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with " 'scrupulous exactitude.' " *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 564 (1978), quoting *Stanford* v. *Texas*, 379 U.S. 476, 485

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[5] Even if *Rubio* had not been withdrawn, the panel opinion in that case would not support petitioners' First Amendment claim. On the contrary, the panel stated (703 F.2d at 1127) (advance sheets) that "[w]e strongly disagree with any inference that criminal investigation is somehow prohibited when it interferes with * * * First Amendment interests [of association]. When activity protected by the First Amendment becomes the subject of a criminal investigation, the protections afforded by the Fourth Amendment come into play." As we show below, this is the same approach adopted by the court of appeals in the present case.

The *Rubio* panel thus reached a result contrary to the decision here not on the general First Amendment principles argued by petitioners, but on the narrower question whether the indicia warrants (which were virtually identical to those in the present case) were based on probable cause. The *Rubio* panel held that they were not, finding no nexus between the indicia of association in the Hells Angels and the alleged criminal activity and reasoning that "where there is no allegation that the enterprise [the Hells Angels] is wholly illegitimate * * *, evidence of mere association would not necessarily aid in obtaining a conviction" (703 F.2d at 1129) (advance sheets). As explained below, the court of appeals in this case disagreed. Again, however, the Ninth Circuit's decision to withdraw *Rubio* means that there is at present no conflict on this narrower point requiring this Court's review.

(1965). The court of appeals applied precisely that standard (Pet. App. A29) and correctly determined that the indicia warrants were sufficiently particularized with respect to the items of clothing, mirrors, plaques and photographs (*id.* at A35).

Petitioners appear to argue, however, that absent any allegation that an organization is wholly illegitimate, the government has no lawful interest in seizing evidence of mere association. But the court of appeals correctly concluded (Pet. App. A15) that evidence of petitioners' membership in the Hells Angels would be probative in this case in that it "would help show [petitioners'] associations with each other and their opportunity to use the Hells Angels organization for illegal activities." The court's ruling (contrary to that of the panel in *Rubio*) is thus consistent with the "mere evidence" rule established in *Warden* v. *Hayden*, 387 U.S. 294, 307 (1967); that is, proof of petitioners' association with the Hells Angels, while not itself evidence of crime, would *aid* in securing petitioners' conviction on the charges of conspiring to use the Hells Angels to control the methamphetamine traffic in Omaha.

Accordingly, the government had a compelling law enforcement interest in seizing the indicia evidence. See *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 90-105 (1961); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 75-77 (1928). By the same token, any impingement on petitioners' associational rights resulting from seizure of the indicia evidence was negligible in view of the fact that Hells Angels members, by their dress, customarily publicly identify themselves as such and therefore would not be harmed by the disclosure of their membership. In these circum-

stances, petitioners have failed to make out a sound First Amendment claim requiring invalidation of the parts of the warrants authorizing searches for clothing, mirrors, plaques, and photographs indicative of membership in the Hells Angels.[6]

2. The courts of appeals have repeatedly held that the unlawfully general portions of a search warrant may be severed from so much of the warrant as satisfies the particularity requirement and that items seized pursuant to the lawful portions of the warrant need not be suppressed. See *United States* v. *Riggs*, 690 F.2d 298 (1st Cir. 1982); *United States* v. *Christine*, 687 F.2d 749 (3d Cir. 1982); *United States* v. *Cardwell*, 680 F.2d 75 (9th Cir. 1982); *United States* v. *Cook*, 657 F.2d 730 (5th Cir. 1981). See also 2 W. LaFave, *Search and Seizure* § 4.6(f), at 111-112 (1978).

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[6] Although the court of appeals did not revisit the issue in its en banc decision in *Fitzgerald*, a majority of the court expressed considerable doubt about the applicability of the First Amendment to petitioners' membership in the Hells Angels (App., *infra*, 12a-13a):

> The right-of-association question [decided by the panel] especially gives me pause. Presumably no one would argue that there is a First Amendment right to ride a motorcycle. Whether the First Amendment nonetheless guarantees the right of two or more people to ride motorcycles in groups, is a question much more doubtful than the panel opinion implies. No one contends that the Hell's Angels petition Congress for redress of grievances, or advocate ideas or doctrines, so far as I know. Whatever right of association they have, then, probably is an aspect of that "liberty" which the Due Process Clause seems to protect against arbitrary or irrational governmental action, rather than a right entitled to the more expansive protection of the First Amendment * * *.

The panel majority attempted to distinguish these cases, stating that "no court has permitted the admission of items found in plain view while executing the specific parts of the warrant" (Pet. App. A57). In fact, however, one circuit had previously applied the severance rule to evidence seized in plain view while executing a partially valid warrant, and the Eighth Circuit itself has now adopted the "plain view-severance" rule in its opinion in *Fitzgerald*. See App., *infra*, 6a-7a; *United States* v. *Freeman*, 685 F.2d 942, 952-953 (5th Cir. 1982). Moreover, as a matter of logic, there is no reason not to apply the severance rule to evidence discovered in plain view pursuant to execution of the valid portions of a warrant. See 2 W. LaFave, *supra*, § 4.6(f), at 112-113. The controlling principle must be whether the officers had a right to be searching in the locations that yielded the plain view evidence; as discussed below, that standard was met here.

In the instant case, the court of appeals held that while the federal search warrants were impermissibly general with respect to the telephone books, papers and "other items" containing names of Hells Angels members, the descriptions of the jackets, belt buckles, photographs, plaques and mirrors were sufficiently particularized (Pet. App. A35). Judge Bright correctly found (*id.* at A70) that the officers executing the federal warrants would have found a sufficient number of the firearms in plain view during their search for the particularized items to sustain the convictions.

With respect to petitioner Apker, the only gun was found in a shaving kit in the bedroom (Pet. App. A64); with respect to petitioner Davenport, three guns were found in the bedroom, including one in a

dresser drawer (*ibid.*); and with respect to petitioner Gearhart, two guns were found under the mattress in the bedroom, two in a bedroom closet, two on top of a hutch in the bedroom, and 17 in a wooden crate in the living room (*id.* at A65-A66). We submit that each of these areas legitimately could and would have been searched pursuant to the valid portions of the indicia warrants. The panel majority's objection that "[t]here is nothing in the record to show whether the police found the guns at [petitioners'] residences when they were looking for the specific items or the general items" (*id.* at A57-A58) unrealistically compartmentalizes the searches and is simply unpersuasive. Particularly in this case, in which the officers had valid warrants for items that could be located anywhere in the residences (*e.g.*, belt buckles, plaques, jackets, and T-shirts), it is apparent that a complete search of every part of each residence was required to execute the valid portions of the indicia warrants. Thus, the majority's fear (*id.* at A58) that a "plain view-severance" rule could lead to abuses is plainly unfounded on the facts of this case, in which the officers had a right to search all parts of petitioners' residences in order to execute the specific portions of the warrants.[7]

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[7] In *Fitzgerald*, the court adopted various safeguards to ensure against abuses of the "plain view-severance" rule (App., *infra*, 7a):

> First, magistrates must exercise vigilance to detect pretext and bad faith on the part of law enforcement officials. Second, courts should rigorously apply the exclusionary rule to evidence seized pursuant to the invalid portions of the warrant. Third, items not described in the sufficiently particular portions of the warrant will not be admissible unless it appears that (a) the police found

The panel majority also objected that the "plain view-severance" approach is inappropriate in the context of indicia warrants because of the danger that such warrants will be used as pretexts for general searches (Pet. App. A58). This concern is not well taken where, as here, the items seized in plain view were contraband and the district court found that the searches were not pretextual (*id.* at A43), a finding upheld by the court of appeals (*id.* at A43-A44). Moreover, as Judge Bright observed (*id.* at A71), indicia warrants "must still meet the probable cause requirement" and "must still be executed in a manner consistent with the authorization given the officers in the warrant." There is therefore no reason to depart from the well-accepted severance rule in this case, particularly in light of its subsequent adoption by the Eighth Circuit sitting en banc.

3. The decision below also represents a proper invocation of the inevitable discovery doctrine. As the court of appeals correctly concluded (Pet. App. A55), the guns would certainly have been found during execution of the valid state search warrants.

Nevertheless, petitioners maintain that the inevitable discovery doctrine is not applicable here for

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the item[s] in a place where one would reasonably have expected them to look in the process of searching for the objects described in the sufficiently particular portions of the warrant, (b) the police found the item[s] before they found all the objects described in the sufficiently particular portions of the warrant (that is, before their lawful authority to search expired), and (c) the other requirements of the plain view rule—inadvertent discovery and probable cause to associate the item[s] with criminal activity—are met.

As discussed in the text, these standards were satisfied in petitioners' case.

several reasons. First, they appear to claim (Pet. 17) that the state search warrants were tainted because their issuance rested on the discovery of drugs in plain view during the execution of the invalid federal search warrants. But the court of appeals determined that the drugs were observed during execution of the valid federal *arrest* warrants. Thus, officers saw the drugs at petitioner Apker's residence while conducting a "sweep search" for persons on the premises who might present a security risk (Pet. App. A49). See, *e.g.*, *United States* v. *Looney*, 481 F.2d 31 (5th Cir. 1973) (upholding a "sweep search"); *United States* v. *Christophe*, 470 F.2d 865, 869 (2d Cir. 1972) (same). At the residence where petitioner Davenport was arrested, officers saw the drugs in the kitchen when they followed Davenport there to get his clothes following his arrest (Pet. App. A50). See *Washington* v. *Chrisman*, 455 U.S. 1, 6-7 (1982) (police may accompany a person under custodial arrest in his residence). And at petitioner Gearhart's residence police found drugs while searching the bedroom for weapons before allowing an undressed woman to get dressed in the privacy of the bedroom (Pet. App. A50). As the court of appeals concluded (*ibid.*), "[t]here is no question that the discovery of the suspected controlled substances at each residence was proper and that therefore the state search warrants were valid." [8]

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[8] There is thus no conflict between the decision below and *United States* v. *Griffin*, *supra*. In *Griffin*, officers made a concededly illegal entry into the defendant's home, and they did not await the issuance of a warrant before conducting a search of the residence. The court of appeals held only that "police who believe they have probable cause to search cannot enter a home without a warrant merely because they plan

Next, petitioners argue (Pet. 17) that the inevitable discovery doctrine was incorrectly applied because the discovery of the drugs and firearms during the federal searches was not "inadvertent." To be sure, in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 470-471 (1971), a plurality of this Court concluded that in order for property to be subject to seizure under the "plain view" doctrine, its discovery must be "inadvertent."[9] However, the *Coolidge* plurality did not apply the "inadvertency" requirement to the seizure of stolen goods or contraband that a defendant is not lawfully entitled to possess. 403 U.S. at 471. See *United States* v. *Cutts*, 535 F.2d 1083, 1084 (8th Cir. 1976). Here, the federal and state officers were told prior to the searches that petitioners had felony convictions and therefore could not lawfully possess firearms (Pet. App. A7). Moreover, there is no suggestion that the agents had probable cause to believe they would find drugs or firearms while executing the arrest warrants. Accordingly, the "inadvertency" requirement was not implicated here, and it presented no impediment to the court's invocation of the inevitable discovery doctrine.

Petitioners further argue (Pet. 17) that the state officers had no basis for seizing the firearms during

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subsequently to get one." 502 F.2d at 961. Here, by contrast, the officers lawfully entered petitioners' residences pursuant to the federal *arrest* warrants. Thus, the subsequent procurement of the state search warrants was wholly untainted by any antecedent illegality.

[9] In our view, the "inadvertency" requirement is unsound. See *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 6-8. In a suitable case, we would favor review of the question by the Court. For the reasons we explain below, however, this is not such a case.

their search for drugs. However, officers may always seize contraband observed in plain view while they are conducting a lawful search. Moreover, guns are clearly probative evidence in a prosecution for conspiring to distribute narcotics, particularly where, as here, an indictment was outstanding charging that the defendants used threats, beatings, torture, and murder against their competitors.

Finally, petitioners argue (Pet. 20-21) that the inevitable discovery doctrine is inapplicable because the federal indicia searches constituted pretextual searches for contraband. Both the district court and the court of appeals rejected this fact-bound contention (Pet. App. A43-A44), and further review by this Court is unwarranted. See *Berenyi* v. *Immigration Director*, 385 U.S. 630 (1967).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 82-1242

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UNITED STATES OF AMERICA, APPELLEE

*v.*

JANICE FITZGERALD, APPELLANT

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Appeal from the United States District Court
for the District of Nebraska

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Submitted: September 2, 1983

Filed: December 7, 1983

Before LAY, Chief Judge; FLOYD R. GIBSON, Senior Circuit Judge; HEANEY, BRIGHT, ROSS, MCMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges. EN BANC.

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BRIGHT, Circuit Judge.

A jury convicted Janice Fitzgerald and three co-defendants of violating 18 U.S.C. App. § 1202(a)(1) (possession by a convicted felon of a firearm in inter-

state commerce).[1] A three-judge panel of this court affirmed the convictions of the three codefendants, but on a divided vote reversed Fitzgerald's. *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983).

The United States petitioned for rehearing en banc, which this court granted, limited to the question whether firearms discovered in plain view during the course of a search pursuant to a federal search warrant, which warrant fails to describe some of the objects of the search with sufficient particularity, are admissible into evidence. We hold such firearms admissible, and affirm Fitzgerald's conviction. Except as to this issue, our decision en banc does not otherwise disturb the panel opinion in this case.

I. *Background.*

A grand jury indicted Fitzgerald and nine other persons, alleging that as members or associates of the Hells Angels they conspired to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Federal warrants issued authorizing the arrest of the indictees, and the search of their residences for various indicia of Hells Angeles membership which would serve to establish their involvement in the alleged drug conspiracy.[2] Teams of federal and

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[1] The Honorable Albert G. Schatz, United States District Judge for the District of Nebraska, presided at trial.

[2] The search warrants authorized the search and seizure of the following items:

A. Sleeveless leather and jean jackets with a Death's Head insignia with wings on the back with the notation "Hell's Angels" written above the Death's Head and the [*sic*] state that the party is a member of, in this case Nebraska, is written beneath the Death's

state law enforcement officers executed the arrest and search warrants early on the morning of February 28, 1981. At Fitzgerald's residence, the officers seized a Hells Angels T-shirt, a Hells Angels poster and medallions, a mirror bearing a Hells Angels sticker, a large number of photographs and photo albums, a telephone directory, and various other documents. They also seized three firearms: (1) a shotgun found in its case resting against the wall of a bedroom closet, (2) a pistol found in the pocket of a woman's coat hanging in the closet, and (3) a rifle found "behind a dresser drawer." These firearms supplied the basis for Fitzgerald's subsequent indictment and conviction under § 1202(a)(1), from which conviction she now appeals.

The three-judge panel which initially considered the appeal of Fitzgerald and her codefendants held the search warrants invalid on the ground that they failed to describe some of the objects of the search with sufficient particularity. Specifically, the panel determined that the warrant provisions authorizing the seizure of Hells Angels membership directories

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Head symbol (commonly and hereafter referred to as "Hell's Angel's Colors").

B. A metal belt buckle which states "Hell's Angels" on it.

C. Certain plaques, mirrors and other items which give the names of members of the Hell's Angels.

D. Photographs which depict the association of members of the Hell's Angels.

E. Telephone books with telephone numbers listed therein of members of the Hell's Angels, which includes local and national members.

F. Certain papers relating to Club activities, expenditures, financial records, Club rules and regulations.

G. Red T-shirts with "Hell's Angels" printed on them.

and "papers relating to Club activities" were too broad to satisfy the "scrupulous exactitude" standard which applies to warrants impinging on first amendment interests. *See United States v. Apker*, *supra*, 705 F.2d 293, 299-303. The invalidity of those portions of the warrants is not at issue here. But the panel also held that the portions of the warrants describing jackets, belt buckles, T-shirts, photographs, and plaques and mirrors satisfied the scrupulous exactitude requirement. *Id.* at 302-303. The precise issue before the court on this rehearing is whether the invalidity of certain portions of the warrants renders the warrants wholly invalid, as the panel majority held, or whether, rather, the insufficiently particular portions of the warrant can be severed from the rest, leaving the warrant intact apart from the severed portions.

For the reasons set forth below, we adopt the severance approach, and hold the warrants valid as to those portions which authorized a search for particular items, *i.e.*, certain articles of clothing, belt buckles, plaques and mirrors, and photographs tending to show association with the Hells Angels. Because the warrants as redacted were valid, the police possessed authority under the "plain view" doctrine, *see Texas v. Brown*, 103 S.Ct. 1535 (1983), and *Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971), to seize any apparent contraband or evidence of a crime they might inadvertently find while executing the valid portions of the warrant. On the record before us, it appears clear that the officers discovered the shotgun in Fitzgerald's closet in plain view during the search for clothing carrying insignia of the Hells Angels. Because the shotgun seized during execution of the valid portions of the warrant

suffices to support Fitzgerald's conviction under § 1202(a)(1), we affirm that conviction.

II. *Discussion.*

The prime purpose of the rule excluding evidence seized in violation of the fourth amendment is the deterrence of future unlawful police conduct. *United States v. Calandra*, 414 U.S. 338, 347 (1974). Additionally, the rule serves to protect courts from any taint-by-association with police misconduct, and prevents the prosecution from benefiting from unconstitutional police activity. *See United States v. Cook*, 657 F.2d 730, 734 (5th Cir. 1981). In deciding whether particular evidence should be suppressed in any given case, then, courts properly weigh the deterrent effect of the suppression against its societal costs. *See, e.g., United States v. Janis*, 428 U.S. 433, 453-54, 457-58 (1976). Where little or no deterrence will result from suppression, suppression is inappropriate, for where the reason for the rule ceases, its application also must cease.

Here, then, we consider whether suppressing the firearms seized in Fitzgerald's bedroom would advance the purposes which animate the exclusionary rule. First, we observe that the law enforcement officials in this case sought and obtained arrest and search warrants from a magistrate. The magistrate, the district court, and the three-judge panel of this court all concluded that the police had probable cause to search Fitzgerald's residence. Five of the seven clauses of the search warrant met the particularity requirement in describing the objects of the search; the other two were subsequently held deficient only in that they failed to satisfy the "scrupulous exactitude" test. Nothing in the record suggests that the officers

or the magistrate did not believe themselves to be according the indictees' constitutional rights the full respect they merit. Under these circumstances, we do not think it would advance the purposes behind the exclusionary rule to exclude *all* that the officers seized in Fitzgerald's residence, merely because the warrant was in one respect deficient. Accordingly, we follow the approach which the First, Third, Fifth, Sixth, and Ninth Circuits,[3] and several states,[4] have adopted, and hold that, absent a showing of pretext or bad faith on the part of the police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution. More precisely, we hold that the infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant (assuming such evidence could not otherwise have been seized, as for example on plain-view

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[3] *See United States v. Riggs*, 690 F.2d 298 (1st Cir. 1982) (adopting severance); *United States v. Christine*, 687 F.2d 749 (3d Cir. 1982) (adopting severance); *United States v. Cook*, *supra*, 657 F.2d 730, 734-36 (5th Cir. 1981) (adopting severance); *United States v. Freeman*, 685 F.2d 942, 952-53 (5th Cir. 1982) (admitting evidence discovered in plain view during execution of the valid portions of a severed warrant); *Sovereign News Co. v. United States*, 690 F.2d 569, 576 (6th Cir. 1982) (adopting severance), *petition for cert. filed*, 51 U.S.L.W. 3775 (U.S. April 11, 1983) (No. 82-1676); *United States v. Cardwell*, 680 F.2d 75 (9th Cir. 1982) (endorsing the severance approach but holding the warrant in question not susceptible of severance).

[4] *See, e.g., Aday v. Superior Court*, 55 Cal. 2d 789 (1961) (admitting items seized pursuant to valid portions of warrant, other portions of which were insufficiently particular). *See also United States v. Giresi*, 488 F. Supp. 445, 459 n.17 (D.N.J. 1980) (collecting state cases).

grounds during the execution of the valid portions of the warrant), but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain view grounds, for example—during their execution). This approach, we think, complies with the requirements of the fourth amendment.

We recognize the dangers which would attend on this approach were it carelessly administered. The police might be tempted to frame warrants in general terms, adding a few specific clauses in the hope that under the protection of those clauses they could engage in general rummaging through the premises and then contend that any incriminating evidence they recovered was found in plain view during the search for the particularly-described items. We believe, however, that careful administration of the rule will afford full protection to individual rights. First, magistrates must exercise vigilance to detect pretext and bad faith on the part of law enforcement officials. Second, courts should rigorously apply the exclusionary rule to evidence seized pursuant to the invalid portions of the warrant. Third, items not described in the sufficiently particular portions of the warrant will not be admissible unless it appears that (a) the police found the item in a place where one would reasonably have expected them to look in the process of searching for the objects described in the sufficiently particular portions of the warrant, (b) the police found the item before they found all the objects described in the sufficiently particular portions of the warrant (that is, before their lawful authority to search expired), and (c) the other requirements of the plain view rule—inadvertent discovery and probable cause to associate the item with criminal activity—are met.

III. *Conclusion.*

Applying these standards to Fitzgerald's case, we conclude that at least one of the weapons introduced against her was properly received into evidence. The valid portions of the warrant authorized the officers to search for, among other things, certain jackets, T-shirts, and belt buckles. The officers would reasonably have looked in the bedroom closet for these items, and it was there, in plain view, that they found the shotgun. The officers never found a Hells Angels belt buckle or jacket at Fitzgerald's residence, so their discovery of the shotgun occurred before the expiration of their authority under the warrant to search for particularly-described items. Because the record reflects neither pretext, bad faith, nor lack of inadvertence on the officers' part, the district court properly admitted the shotgun into evidence.

The pistol, on the other hand, is not admissible. We do not think the police had reason to search the pockets of an ordinary overcoat while looking, pursuant to the valid portions of the warrant, for Hells Angels insignia. Likewise, the record relating to the discovery of the rifle fails to disclose sufficient information to permit us to conclude that the officers discovered it in plain view during the execution of the valid portions of the warrant. We know that the police discovered the rifle "behind a dresser drawer," but not why they were looking there. But because possession of one weapon is enough to support a conviction under § 1202(a)(1), it is not necessary to determine whether the rifle is admissible. In the context of this case, moreover, the trial court's admission of the pistol and the rifle into evidence must be deemed harmless error.

The conviction is affirmed.[5]

FLOYD R. GIBSON, Senior Circuit Judge, concurring in the result.

While I concur in the result upholding Fitzgerald's conviction based upon the admission of the guns seized from her residence, I would reach that result by applying the widely adopted inevitable discovery exception to the exclusionary rule. Although the record shows the guns were actually seized pursuant to the partially invalid federal search warrant, they were nevertheless admissible against Fitzgerald because they could have been discovered while the officers were executing the valid state search warrant authorizing the search of Fitzgerald's residence for suspected controlled substances.

In the original panel opinion, I applied the inevitable discovery exception to uphold the conviction of Apker, Davenport, and Gearhart, finding that the guns admitted against them could have been discovered pursuant to independently obtained valid state search warrants authorizing the search of their residences for "suspected controlled substances." In Fitzgerald's case, however, I refrained from applying the inevitable discovery exception to permit the admission of the guns discovered at her residence, finding no evidence of an independent state search warrant for her residence. See *United States v. Apker*, 705 F.2d at 306-07.

Upon reviewing the record again, I realized that there was a valid state search warrant authorizing

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[5] Chief Judge Lay joins this opinion in its entirety. Judges Ross, Arnold, John R. Gibson, Fagg, and Bowman join in all but Part III. of this opinion, and concur in the affirmance. Judge Floyd R. Gibson concurs in the result only, for the reasons set forth in his separate opinion.

the search for drugs at Fitzgerald's residence (Government exhibit #7). The state search warrant was based upon Omaha Narcotics Officer Tomschecks' observation of suspected controlled substances shortly after he and three other officers arrived at Fitzgerald's residence to execute the federal arrest and search warrants. In his affidavit in support of the state search warrant, Officer Tomscheck stated that while he was serving the "Federal Search Warrant", he observed "one metal vial containing suspected cocaine residue and one cocaine metal tooter" on the top of a bedstand in Fitzgerald's bedroom. At the suppression hearing, Tomscheck testified that he first observed the vial and tooter on the bedstand while he was conducting a "sweep search" (i.e., a search for persons who might present a security risk) incident to the execution of the federal arrest warrant. (See suppression hearing transcript 65-68).

The validity of the state search warrant, and hence the propriety of admitting the guns under the inevitable discovery exception, depends upon whether Tomscheck saw the suspected cocaine residue while conducting the legitimate sweep search incident to the arrest or while executing the partially invalid federal indicia search warrant.* If Officer Tomscheck

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* Under the majority's plain view-severance approach, this inquiry would be of academic interest only. First, the plain view-severance approach justifies the eventual seizure of the guns regardless of the validity of the state search warrant. Second, even considering the validity of state search warrant, the officer's plain view observations would provide a valid basis for the issuance of the state search warrant for drugs regardless of whether those observations were made during the execution of the partially invalid federal search warrant. Since Officer Tomscheck clearly observed the suspected cocaine residue "in a place where one would reasonably have expected

had seen the suspected cocaine residue during the sweep search, then the state search warrant would have been valid and the guns would have been admissible under the inevitable discovery exception. *See Apker*, 705 F.2d at 306-07. However, if he had seen these items while executing the invalid federal indicia search warrant, the state search warrant would have been invalid as "the fruit of the poisonous tree"—the poisonous tree being the invalid federal search warrant.

The district judge's findings on the validity of the state search warrant are instructive. The trial judge initially concluded that the state search warrants for all of the defendant's residences were not the "fruit of the poisonous tree" because the federal indicia search warrants were valid. (Designated Record at 40). He then alternatively found that even if the federal search warrants were invalid, the state search warrants, including the one issued for Fitzgerald's residence, were still valid because they were based upon the observation of "suspected controlled substances" during the course of sweep searches incident to the execution of the arrest warrants. (Des. Rec. at 40 n.2). Officer Tomschecks' suppression hearing testimony supports this finding as it applies to Fitzgerald's case. (SH 65-68). Moreover, it is certainly reasonable to infer that Tomscheck could have observed the suspected cocaine residue on the top of the bedstand while he was conducting a legitimate sweep search of Fitzgerald's bedroom.

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[him] to look in the process of searching for the objects described in the sufficiently particular portions of the [indicia] warrant", (maj. opin. at 7) the state search warrant would not be the fruit of any poisonous tree.

Thus, because the state search warrant for Fitzgerald's residence was valid, being based upon Tomschecks' plain view observation during the legitimate sweep search, the three guns found in Fitzgerald's apartment would be admissible under the inevitable discovery exception to the exclusionary rule. My conclusion here is of course based upon the assumption that the officers would have discovered all three guns while they were searching for controlled substances under the valid state search warrant. I would therefore affirm Fitzgerald's conviction without applying the plain view-severance approach to the partially invalid indicia warrants.

ARNOLD, Circuit Judge, concurring, with whom ROSS, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, join.

For the reasons so ably stated by the Court, I agree that the plain view-severance approach is proper, that the shotgun was validly seized, and that the conviction should be affirmed. I do not join Part III of the lead opinion, however, because in my view the pistol and the rifle were also validly discovered and seized. A belt buckle could have been found in an overcoat pocket, or behind a dresser drawer. It was therefore wholly proper for the officers executing the warrant to be looking in those places.

I also wish to emphasize that the Court en banc is not holding that the Hell's Angels have a First Amendment right of association, or that any clause in this warrant was not particular enough in its description of the articles to be seized. Those conclusions were reached by the panel, but they were not referred to the Court en banc for its review. The right-of-association question especially gives me

pause. Presumably no one would argue that there is a First Amendment right to ride a motorcycle. Whether the First Amendment nonetheless guarantees the right of two or more people to ride motorcycles in groups, is a question much more doubtful than the panel opinion implies. No one contends that the Hell's Angels petition Congress for redress of grievances, or advocate ideas or doctrines, so far as I know. Whatever right of association they have, then, probably is an aspect of that "liberty" which the Due Process Clause seems to protect against arbitrary or irrational governmental action, rather than a right entitled to the more expansive protection of the First Amendment, which forbids reasonable as well as unreasonable attempts by Congress to abridge the freedom of speech. "It may be . . . that association for ends specifically mentioned in the First Amendment will prevail against all state interests not regarded as 'compelling,' while other kinds of association . . . would be protected not by the specific guarantees of the Bill of Rights, but by the more nebulous concept of substantive due process, an oxymoron if there ever was one." *United States Jaycees v. McClure*, 709 F.2d 1560, 1568 (8th Cir. 1983) (footnote omitted).

The panel opinion holds that the Hell's Angels is an association protected by the First Amendment. Since the Court en banc, as I read its opinion, does not reach that question, but simply takes the panel's conclusion as a given for purposes of analysis, it is not necessary for me to pursue the issue.

HEANEY, Circuit Judge, dissenting, with whom MCMILLIAN, Circuit Judge, joins.

I respectfully dissent. The search of Janice Fitzgerald's home was unreasonable under the circum-

stances and not supported by probable cause. It in reality was nothing more than a fishing expedition. We should suppress the evidence seized without hesitation.

The interpretative case law today surrounding the fourth amendment tends to obscure the amendment's simple prohibition against *unreasonable* searches and seizures. This reasonableness standard is not capable of precise definition or mechanical application, but depends upon the circumstances of each case. *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (per curiam); *Chimel v. California*, 395 U.S. 752, 765 (1968); *Terry v. Ohio*, 392 U.S. 1, 19 (1968). In considering the circumstances, we must remember that the right to privacy is "basic to a free society." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). We must examine "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

Fourth amendment protection is strongest at the threshold of the private home. As the Supreme Court recently reaffirmed:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "the right of people to be secure in their * * * houses ** * * shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth

> Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Silverman v. United States*, 365 U.S. 505, 511.

*Payton v. New York*, 445 U.S. 573, 589-590 (1980). Undeniably, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1977), *quoted in Payton v. New York, supra*, 445 U.S. at 585; *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971).

The totality of the circumstances here compels the decision that the search of Fitzgerald's home was unreasonable. First, the circumstances leading up to the search indicate the indicia warrant was a pretext for a general search. The affidavit for the search warrant did not contain any information indicating that drugs or weapons would be found in Fitzgerald's home. Yet, the morning of the search, teams of law enforcement officers from the United States Attorney's Office, the United States Bureau of Alcohol, Tobacco and Firearms, the United States Drug Enforcement Agency, the Nebraska State Patrol, the Douglas County Sheriff's Office and the Omaha Police Department met at the Omaha Police Department. There, various local and federal officers addressed them concerning the execution of the search and arrest warrants. Those present at the briefing were told they could look everywhere in the suspects' residences and to be on the lookout for guns and drugs. In the event an officer observed these items, a magistrate, typist, and other law enforcement personnel were standing by ready to quickly issue state search warrants. The only basis for instructing the officers in this manner was the hope that the thorough search

authorized by the indicia warrants would turn up guns and drugs which the courts would later rule admissible under the plain view exception.

Second, the law enforcement officers had little need for the indicia evidence they ostensibly sought. Indicia of membership in the Hell's Angels could provide only circumstantial evidence of the association element of conspiracy.[1] Moreover, the authorities already had some circumstantial evidence of Fitzgerald's association with Hell's Angels members. The affidavit for the search warrant recites that Fitzgerald is the widow of a Hell's Angels member. Law enforcement officers observed her at her husband's traditional Hell's Angels funeral. In fact, Fitzgerald had gone to the police property unit of the Omaha Police Department after her husband's death to retrieve his property, including a Hell's Angels ring and belt buckle. The minimal probative value of the indicia evidence, together with the fact that the government already had evidence of Fitzgerald's association with the Hell's Angels, bolsters the conclusion that the indicia warrant provided a pretext for a general search.

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[1] As the majority panel notes, police can search for "mere evidence" of a crime if there is a nexus between the item to be seized and criminal behavior. *United States v. Apker*, 705 F.2d 293 (8th Cir. 1983), citing with approval *Warden v. Hayden*, 387 U.S. 294, 307 (1967). In other words, there must be probable cause to believe the evidence sought will aid in the particular apprehension or conviction. *Id.* I do not agree that evidence of membership in a legal organization helps prove a particular defendant conspired with others to commit an illegal act. In Fitzgerald's case, the Hell's Angels indicia in her home could only prove what the police already knew: that she is the widow of a Hell's Angel. I would strike down the search warrant because the police had no legitimate reason for searching Fitzgerald's home for Hell's Angels indicia.

Finally, the affidavit for the search warrant recited no facts which would permit either the neutral magistrate who issued the warrant or any reviewing court to determine whether there was probable cause to believe Fitzgerald was involved in an illegal drug conspiracy. The affidavit incorporates the grand jury indictment which names ten defendants. The indictment states that nine of these defendants are members of the Hell's Angels and that "Defendant Janice Fitzgerald was and is an Associate of the Hell's Angels by reason of her marriage to Leslie Fitzgerald, a deceased member of the Hell's Angels, and by reason of her participation in the activities of the Hell's Angels during the period of this conspiracy." According to the indictment, the Hell's Angels organization, including the defendants, is attempting to monopolize methamphetamine distribution in the Omaha, Nebraska, vicinity. All of the acts alleged pertain to the entire organization; the indictment does not specify a single act by Fitzgerald in furtherance of the conspiracy. The only additional information the affidavit for the search warrant adds is the affiant's reasons for believing indicia of membership in the Hell's Angels would be found in the suspects' homes. Since the minutes of the grand jury are secret, the magistrate and this Court must accept on faith the existence of evidence linking Fitzgerald to the drug conspiracy.[2] The impossibility of reviewing the prob-

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[2] I do not agree with the majority panel opinion that the incorporation of the indictment into the affidavit for a search warrant provided probable cause to believe, for fourth amendment purposes, that Fitzgerald was engaged in criminal activity. While a grand jury indictment, without more, provides probable cause for an arrest warrant, this rule should not be extended to search warrants. *See* Thompson, C., *The Fourth Amendment Function of the Grand Jury*, 37 Ohio L. J. 727 (1976).

able cause determination, added to the previously cited factors, makes this search unreasonable.

In sum, a review of the facts leads to the inescapable conclusion that the law enforcement officers were seeking an excuse to execute a general search of Fitzgerald's home. A sealed grand jury indictment, an indicia warrant of doubtful necessity and a conscious resort to the plain view exception provided the excuse. While the outcome of Fitzgerald's trial on the conspiracy count is not relevant to the probable cause determination, I cannot help but note that after months of preparation and weeks of trial, the government could not produce enough evidence to go to the jury on the conspiracy charge. The government could only prove firearm possession violations with evidence bootstrapped into the trial through the plain view exception. I do not think the government should be allowed to succeed in this conscious violation of the fourth amendment protection against the general search. I would therefore reverse Janice Fitzgerald's conviction.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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